85-1395

No.

Supreme Court, U.S.
FILED
FEB 3 1986
JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL STEEL CORPORATION,

Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTION PRESENTED

Whether requiring Petitioner, who is no longer a customer of Mountaineer Gas Company, to make payments to Mountaineer Gas Company, successor to Columbia Gas of West Virginia, Inc., for gas purchased from Columbia between July 1, 1980, and October 31, 1984, although Petitioner has fully paid for said gas under the rates in effect at that time and approved by the Public Service Commission of West Virginia, without notice to the public of its contemplation of engaging in retroactive ratemaking, and without notice to the public that said case would involve a modification of the Public Service Commission's Administrative Rule 30-C, which governed said proceedings, is a violation of the Fourteenth Amendment of the United States Constitution, as a denial of due process.

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INTRODUCTION

National Steel Corporation, Petitioner, petitions for a writ of certiorari from the decision of the Supreme Court of Appeals of West Virginia entered by Order dated November 6, 1985, denying a Petition for Suspension and Review of the Final Order of the Public Service Commission of West Virginia, dated July 10, 1985, in Case No. 83-348-G-30C, Columbia Gas of West Virginia, Inc., Application to change rates, effective November 1, 1983, according to Rule 30-C,

General Order No. 183.4, Purchase Gas Application, and Case No. 84-100-G-SC, Columbia Gas of West Virginia, Inc., Proceeding Upon the Commission's Own Motion requiring Petitioner to make payments to Mountaineer Gas Company, successor to Columbia Gas of West Virginia, Inc., for gas purchased from Columbia from July 1, 1980 and October 1, 1984, even though Petitioner paid for said gas during said time period under the rates legally in effect at that time and approved by the Public Service Commission of West Virginia. Petitioner submits this statement to show that the Supreme Court of the United States has jurisdiction of the writ of certiorari and that a substantial Federal question is presented.

OPINIONS BELOW

The Final Order of the Supreme Court of Appeals of West Virginia dated November 6, 1985, is attached hereto as Appendix A. The Final Orders of the Public Service Commission of West Virginia in Case Nos. 83-348-G-30C and 84-100-G-SC, dated October 31, 1984, December 28, 1984, and July 10, 1985, respectively, not yet reported, are attached hereto as Appendix B.

JURISDICTION

(A) The jurisdiction of this Court to review the decision of the Supreme Court of Appeals of West Virginia, is conferred by Title 28, United States Code, Section 1257(3). The Final Orders of the Public Service Commission, dated October 31, 1984, and July 10, 1985 require that Petitioner pay reparations for a utility service previously purchased and consumed. As such, said Orders of the Public Service Commis-

sion constitute the exercise of a delegated power judicial in nature. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932). The Order of the Supreme Court of Appeals of West Virginia denying the petition for suspension and review of said Commission Orders constitutes a judgment upholding the judicial decision of the Public Service Commission against Petitioner's claim of invalidity under the 14th Amendment to the United States Constitution. The Supreme Court's jurisdiction in this case by writ of certiorari is thus established, as Petitioner is specifically claiming a "title, right, privilege or immunity" under the Constitution of the United States. 28 U.S.C. §1257(3).

(B) The judgment of the Supreme Court of Appeals of West Virginia sought to be reviewed was made and entered on November 6, 1985. Petitioner's Notice of Appeal, attached hereto as Appendix C, was filed in the office of the Clerk of the Supreme Court of Appeals of West Virginia and in the office of the Executive Secretary of Respondent on January 28, 1986 (that Court and Respondent then having custody of the record).

THE INVALID DECISION AND THE RELEVANT CONSTITUTIONAL PROVISIONS AND OTHER STATUTES AND REGULATIONS

The decision asserted to be improper is the Order of the Supreme Court of Appeals of West Virginia, entered on November 6, 1985, attached hererto as Appendix A, affirming the Final Orders of the Public Service Commission of West Virginia dated October 31, 1984, December 28, 1984, and July 10, 1985, at-

tached hereto as Appendix B, requiring Petitioner to make payments to Mountaineer Gas Company, successor to Columbia Gas of West Virginia, Inc., for gas purchased from Columbia between July 1, 1980 and October 31, 1984, although Petitioner paid for such gas during said time period under the lawful rates in effect at that time and approved by the Public Service Commission.

This decision violates a prohibition of the 14th Amendment that:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

Although not asserted to be invalid, other relevant state statutes and regulations include:

(a) provisions of the West Virginia Code of 1931, as amended, attached hereto as Appendix D:

(i) Chapter 24, Article 2, Section 3, delegating to the Public Service Commission the power to fix utility rates;

(ii) Chapter 24, Article 5, Section 1, providing the sole and exclusive procedure for judicial review of a Commission order;

(b) Orders of the Public Service Commission of West Virginia, attached hereto as Appendix E:

(i) General Order No. 183.2, entered February 23, 1979, which order provides for a notice and hearing when Respondent amended its Rule 30-C to its present form;

(ii) General Order No. 183.4, entered June 26, 1979, which established the present Rule 30-C of the Public Service Commission Rules and Regulations. Rule 30-C concerns the establishment of a rate for gas purchased by consumers;

(iii) Order from Case No. 83-348-G-30C, Columbia Gas of West Virginia, Inc., dated October 13, 1983, which gave a notice of the hearings of the case from which Petitioner files its present petition, setting forth the purpose of the hearing and what was to be accomplished.

STATEMENT OF THE CASE

On August 10, 1983, Columbia Gas of West Virginia, Inc., (Columbia) filed a Rule 30-C application for recovery of increased purchased gas costs. Columbia applied for an increase from an interim rate of $4.948 per Mcf (1000 cubic feet) to $5.484 per Mcf, effective November 1, 1983. The purchased gas recovery rate is comprised of three components: (1) The gas cost per Mcf of sales, (2) an actual cost adjustment (ACA) increment to reflect over/under recoveries for a previous period, and (3) a factor accounting for the affect of taxes. Columbia's requested increase was primarily based on increase in the gas cost per Mcf of sales from the interim level of $4.905 per Mcf

to $5.255 per Mcf, before ACA and taxes. This request was reduced to $5.151 per Mcf before ACA and taxes in an October 14 amendment of its data supporting the application. Columbia stated an under-recovery of $5,743, 829 for the twelve months ending June, 1983, and total expenses to be recovered through the proceeding of $236,628,100.

By Order entered September 21, 1983, a pre-hearing conference was set to be held on October 5, 1983, in order to establish the identities of the parties, the issues to be addressed, and the procedural schedule to be followed.

On October 13, 1983, Respondent issued an Order establishing a procedural schedule. Two hearings were scheduled, the final substantive hearing to be held on January 9, 1984. Additionally, a hearing was set for October 24, 1983, for the purpose of determining whether an interim rate should be established until a final determination could be reached in the 30-C Case.

On October 24 and 25, 1983, hearings were conducted to determine whether an interim rate was appropriate. On November 14, 1983, an interim purchased gas cost (PGA) increment which included a projected gas cost per volume of sales of $5.043 per Mcf, an ACA increment which reflected Columbia's stated under-recovery for the 12 months ending June 30, 1983, and an adjustment for tax affects was established, subject to refund.

On January 9, and January 11, 1984, hearings concerning the case in chief were held. At the conclusion of these hearings, parties submitted simultaneous initial and reply briefs on all relevant issues.

On February 22, 1984, the Staff of the Public Service Commission filed a petition to reopen the proceedings to receive further evidence and to establish certain associated proceedings to evaluate the adequacies of Columbia's efforts to obtain cheaper gas supplies from Ashland Exploration, Inc. On March 2, 1984, Staff's motion to reopen the 30-C proceeding was granted. Furthermore, Respondent initiated a new proceeding, Case No. 84-100-G-SC, for the purpose of determining the reasonableness of Columbia's practices and the appropriateness of associated sanctions. The matters were consolidated and rescheduled for hearing on March 22, 1984, and then rescheduled for March 29, 1984.

Said additional hearings were held as scheduled. At the conclusion of the hearings, all parties were given the opportunity to submit initial and reply briefs on the relevant issues affecting the Rule 30-C application as well as other issues presented by the show cause proceeding.

On May 11, 1984, Columbia petitioned to increase its actual cost adjustment increment to provide for accelerated recapture of its underrecovery, requesting that Columbia's projected underrecovery balance as of June 30, 1984, be reduced to zero before the beginning of the next PGA period by permitting Columbia to apply an increased ACA surcharged factor to sales during the months of May through October, 1984. This increased ACA surcharge would recover approximately $4,152,556.

On October 31, 1984, Respondent entered an order. This order approved the interim rates and charges established by Respondent on November 14, 1983. Respondent also determined that Columbia's method

of recapturing over/underrecovery balances for a prior period purchased gas costs should be modified. Mountaineer Gas Company, successor to Columbia Gas Company of West Virginia, Inc. was directed to calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1, and IUS-2 rate schedules during the period between November 1, 1981, and October 31, 1984. These rate schedules cover Mountaineer's large volume customers. Mountaineer was to pay any outstanding overrecovery balance and obtain cash payments for any underrecovery balance from individual customers for gas purchased during that period. Said payments were to be made within 12 months after notice of such payment is provided.

On November 13, 1984, a Petition for Reconsideration was filed by Mountaineer Gas Company. An untimely filed Petition for Reconsideration of Westvaco Corporation was filed on November 16, 1984, and accepted.

On December 28, 1984, an Order entitled "Commission Order on Petition for Reconsideration" was entered. This order modified the Order of October 31, 1984. Said December 28, 1984 Order permitted the IUS and LV customers who are required to make cash payments to make them in 12 equal monthly payments, without interest, after receiving notification of the outstanding bill. Any refund that Mountaineer is required to make will be made in the same manner. Said Order also held that calculation of the over/underrecovery balances should begin not on November 1, 1981, but on July 1, 1980.

On January 24, 1985, Westvaco Corporation filed an appeal of Respondent's Orders with the Supreme

Court of Appeals of West Virginia. A similar petition was filed by Petitioner on January 28, 1985. The Supreme Court of Appeals of West Virginia rejected these appeals without opinion on April 23, 1985.

On February 1, 1985, Mountaineer Gas Company filed calculations of outstanding underrecovery balances with the Respondent which purportedly satisfied the Respondent's directive. Upon review of these calculations, it was clear that the Company, without Respondent's approval, included underrecovery balances for the month of November, 1984 within its calculations and so, the filing was rejected.

By Order entered February 28, 1985, Respondent directed the Commission Staff to review Mountaineer's data, develop corrected figures, and file these calculations and supporting data by March 20, 1985 with the Executive Secretary of Respondent and provided interested parties the opportunity to file comments by April 4, 1985. Said comment period was subsequently extended to April 12, 1985.

By Order entered April 24, 1985, Respondent reinstituted the respective repayment obligations, approving the Staff's calculations. Under this Order, an IUS-1, IUS-2, LV-1 or LV-2 customer was to pay any outstanding underrecovery balance determined to exist as of October 31, 1984, per Staff's calculations in twelve (12) equal monthly installments after notice of the outstanding balance is provided by Mountaineer, without accrual of interest. Mountaineer was to pay any outstanding underrecovery balance determined to exist for an IUS-1, IUS-2, LV-1 or LV-2 customer as of October 31, 1984, per Staff's calculations.

On May 3, 1985, Mountaineer Gas Company requested the Order be clarified or modified so as to

allow Mountaineer Gas Company to account for B&O taxes which will accrue against the balance. On May 17, 1985, Petitioner filed a motion which requested that Respondent reopen the period for receiving comments on Staff's over/underrecovery calculations and underlying methodologies. Petitioner noted that it was not provided copies of the February 28, 1985, April 1, 1985 and April 29, 1985 Orders.

On June 13, 1985, Respondent entered an Order on further reconsideration which reopened the period for commenting on Staff's calculations and methodologies used in determining over/underrecovery balances for LV and IUS customers, which were performed in accordance with the Commission's Orders in these cases. The comment period was reopened through Monday, June 24, 1985, and the respective repayment obligations established by Respondent's April 24, 1985 Order was suspended until further order. Said Order also included applicable B&O taxes would be assessed upon the respective over/underrecovery balances in the net amounts to be paid under the terms of the Order.

By Order entered on June 21, 1985, the period for submitting appropriate comments was extended through July 1, 1985.

Comments on the matter were submitted by Westvaco Corporation and Petitioner on June 24, 1985 and July 1, 1985, respectively. Petitioner's filing also included a Petition for Reopening and Reconsideration.

On July 10, 1985, Respondent issued an Order entitled "Commission Order Approving Repayment Obligations After Further Comment" denying National Steel Corporation's Petition for Reopening and Rehearing and reaffirming its previous position regard-

ing required repayments. On August 9, 1985, Petitioner filed an appeal of said Order with the Supreme Court of Appeals of West Virginia. A similar petition was filed by Westvaco Corporation. The Supreme Court of Appeals of West Virginia rejected these appeals without opinion on November 6, 1985.

REASONS FOR PLENARY CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI

The proceeding from which Petitioner's petition for writ of certiorari is taken was convened pursuant to Public Service Commission of West Virginia Rule 30-C of the Rules and Regulations for the Government and the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle. (Appendix E.) Rule 30-C concerns the establishment of a rate for gas purchased by consumers. Normally, a gas rate has three components: customer costs, demand costs, and gas costs. The first two components of the rate, customer costs, which are basically administrative expenses, and demand costs, which are expenses incurred in establishing a physical plant, are not dealt with in a 30-C proceeding. The 30-C proceeding deals only with the third component, gas costs.

Under Rule 30-C, a utility submits to the Public Service Commission of West Virginia an estimate of its expected gas costs for the upcoming year. These estimates are filed with the Commission on or before August 1 for the 12 month period beginning November 1. The Commission then holds hearings and, normally in late October, issues an Order establishing the gas cost component of the utility's rate for the year beginning November 1. Rule 30-C permits the

utilities to submit estimates which include amounts attributable to the previous 12 month period, if there has been an "underrecovery" of such gas costs. Such an "underrecovery" would occur when the utility has underestimated its actual costs for the previous 12 months. The Commission, as set forth in Rule 30-C, allows such an "underrecovery" to be factored into the rates for the upcoming year and recovered from the gas customers. Thus, any "underrecovery" results, in a 30-C proceeding, in an increase in future rates.

In the case below, Respondent acknowledged the nature of the 30-C proceedings:

> The purpose of this proceeding is to establish a reasonable and appropriate purchased gas cost increment to be included in Columbia's tariff sheets. This established increment should reflect Columbia's reasonable purchased gas expenses for the twelve month period projected from November 1, 1983, its prior underrecovery experienced during the twelve month period ending June 30, 1983, plus an adjustment for tax effects.

October 31, 1984, Order, p.4 (Appendix B)

Respondent then proceeded to abandon the contemplated prospective rate making and to require adjustments of rates for the period November 1, 1981 (later changed to July 1, 1980) through October 1, 1984. Respondent authorized Mountaineer Gas Company (successor to Columbia Gas of West Virginia, Inc.) to assign responsibility for the underrecoveries attributable to industrial customers under certain rate schedules during the prior period, notify these cus-

tomers of their assigned underrecoveries, and require the customers to make cash payments in the assigned amount, which was to be determined by Mountaineer Gas Company. This is stated in the October 31, 1984 Order:

> 2. On or before January 1, 1984, Columbia Gas of West Virginia, Inc. (Mountaineer Gas Company) shall calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1 and IUS-2 rate schedules during the period between November 1, 1981 through October 31, 1984. Columbia (Mountaineer) shall inform each IUS and LV customer of any outstanding overrecovery or underrecovery balance by February 1, 1985.
>
> 3. An IUS or LV customer shall pay an outstanding underrecovery balance determined to exist as of October 31, 1984 within twelve (12) months after notice of the outstanding balance is provided by Mountaineer, without accrual of any interest.
>
> October 31, 1984 Order, p. 36. (Appendix B)

Petitioner was a customer of Mountaineer Gas Company until January 11, 1984. Mountaineer provided gas service at Petitioner's Weirton Steel Division in Weirton, West Virginia. On January 11, 1984, Petitioner sold the Weirton Steel Division to Weirton Steel Corporation. Petitioner received no other gas service from Mountaineer Gas Company. The October 31, 1984 Order of Respondent thus created an approximately $2 million liability for Petitioner, a liability which would not have existed

under a normal application of Rule 30-C, since normal 30-C proceedings result in increases in future rates.

West Virginia Code §24-2-3 states, in part,:

> The commission shall have the power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities: Provided, that the commission may exercise such rate authority over municipal utilities only under the circumstances set forth in section four-b [§24-2-4b] of this article. And whenever the commission shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by an order fix reasonable rates, joint rates, tariffs, tolls or schedules to be followed *in the future* in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provisions of law . . .

West Virginia Code §24-2-3 (Emphasis added)(Appendix D).

The Supreme Court of Appeals of West Virginia has, in construing this section, unequivocally held that Respondent, in setting rates, operates prospectively and cannot operate retroactively. *Chesapeake & Potomac Telephone Company of West Virginia v. Public Service Commission*, 300 S.E.2d 607, 619 (W.Va.1982).

Virginia Electric & Power Company v. Public Service Commission, 248 S.E.2d 322 (W.Va.1978).

In *Chesapeake & Potomac Telephone Company of West Virginia v. Public Service Commission*, 300 S.E.2d 607, 619 (W.Va.1982), the Supreme Court of Appeals of West Virginia stated that "retroactive ratemaking occurs when a utility is permitted to recover an additional charge for past losses." It held that such ratemaking was illegal. Mountaineer Gas Company, however, was permitted by Respondent in the case below to do just that. Petitioner, and other industrial customers, during the period July 1, 1980 to October 1, 1984, purchased gas from Columbia under the rates lawfully established by Respondent and on file with Respondent at that time. By its Order of July 10, 1985 (Appendix B), Respondent authorized Mountaineer Gas Company, Columbia's successor, to presently recover an additional charge for losses on past gas sales. Mountaineer may, according to Respondent, send a bill to its gas customers for any underrecovery of gas costs for gas purchased in the past, July 1, 1980 to October 1, 1984.

In attempting to provide some justification for its position, Respondent claimed that this position was adopted pursuant to an Actual Cost Adjustment provided under Rule 30-C, which establishes an annualized true-up adjustment in the PGA which represents a difference between the actual cost of purchased gas during a prior period and the projected cost of gas for various suppliers at the time of the prior PGA filing. Respondent failed to explain that the existing 30-C mechanism deals only with prospective ratemaking. Once an amount that has been "underrecov-

ered" in a prior period is determined, it is added to *future* rates. *See* Rule 30-C (Appendix E). No bills are sent.

Respondent did not follow the provisions of its own Rule 30-C. Rule 30-C specifically calls for the addition of any underrecovery for purchased gas for a preceding period to be added to future gas rates. Rule 30-C(D); Rule 30-C(D)(3)(e) (Appendix E). Respondent did not do this and admits that it did not follow its own administrative rule by describing its actions as "a case-specific modification" of Rule 30-C. July 10, 1985 Order, p. 5. (Appendix B).

Respondent, however, failed to follow proper procedures in order to modify Rule 30-C. Respondent's Order of February 23, 1979, (Appendix E), demonstrates the procedure previously used by Respondent to modify Rule 30-C. This order provided for a notice and hearing when Respondent amended Rule 30-C to its present form. When the present Rule 30-C was adopted, by Respondent's Order of June 26, 1979, (Appendix E), the Rule was filed with the Secretary of State, pursuant to *West Virginia Code* §29A-1-2. Respondent followed no such procedure to amend this Rule 30-C in the case below. Rather, Respondent engaged in what it admits was "a case-specific modification" of Rule 30-C. July 10, 1985 Order, p. 5 (Appendix B).

The public notice of the hearings in the case below, contained in the Order of October 13, 1983, (Appendix E) set forth the purpose of the hearing and what was to be accomplished. The notice gave no indication that gas consumers might be charged a new rate on gas consumed between July 1, 1980 and October 31, 1984, and paid for under the provisions of the tariff prop-

erly filed with and approved by Respondent at that time. The notice gave no hint that a "case-specific modification" of Rule 30-C was contemplated. The only matter of which the public was notified was a compliance with the present Rule 30-C and the establishment of rates for the future.

Reasonable notice to interested persons that their legally protected interests may be adversely affected by administrative action is a requirement of due process. *Walker v. City of Hutchison,* 352 U.S.112 (1956); *North Alabama Express, Inc. v. United States,* 585 F.2d 783 (5th Cir. 1978). In the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Morgan v. United States,* 304 U.S. 1 (1938).

In the case below, Petitioner was not given a reasonable opportunity to know the claims of the adverse parties and an opportunity to meet them. As demonstrated above, the statutory language upon which Petitioner had to rely, the decisions of the Supreme Court of Appeals of West Virginia interpreting that statutory language, the specific language of Rule 30-C, and the language of the notice given for the case below all indicated that a normal Rule 30-C proceeding was to occur. A normal Rule 30-C proceeding did not occur.

In the proceeding below, no suggestion of Petitioner paying Mountaineer Gas Company for gas previously purchased and consumed arose until well into the proceedings. As the record indicates, the subject was not mentioned until near the end of the proceedings when

it was injected into the case in the rebuttal testimony of a member of Respondent's Staff. This was then the basis for Respondent's decision.

Petitioner, prior to this rebuttal testimony, was never apprised of the possibility of liability for previous gas purchases. Other than the opportunity to cross-examine the rebuttal witness, Petitioner was unable to fully develop its opposition to the rebuttal witness' surprise position.

This surprise testimony also created a conflict for Petitioner's legal counsel. At the commencement of the case below, Petitioner was a customer of Mountaineer Gas Company, as it still owned the Weirton Steel facilities. During the case, the sale to Weirton Steel Corporation occurred. Counsel for Petitioner then began to represent both Petitioner and Weirton Steel Corporation, as there was no reason to believe that these parties had conflicting positions. When the rebuttal testimony of a member of Respondent's Staff raised the issue of direct billing to customers for past gas purchases, instead of rolling the underrecoveries into future rates, it created a sudden conflict between Petitioner, an old customer, and Weirton Steel Corporation, a present customer. Yet it was far too late for Petitioner to obtain new counsel during the hearing, further reducing Petitioner's opportunity to meet the adverse claims. Nor did the urgent need for separate counsel become apparent until Respondent issued its initial decision, as the notice and control presentation of the case, as well as the statutes, case law, and language of Rule 30-C, did not make Staff's rebuttal position seem in any way feasible. Petitioner had no notice that it would be seriously considered, and Rule 30-C "case-modified" to accomplish this goal.

The notice in the case below (Appendix E) made no mention of the potential liability for prior gas purchases, or the possibility of a "case-specific modification" of Rule 30-C. Certainly, these are central issues for the proceeding below. The operative test of a notice is that the notice as published must reasonably apprise any interested party of the issues involved in the proceeding. *North Alabama Express, Inc., supra.* The notice in the case below cannot possibly have met this test.

Proper notice is a jurisdictional prerequisite to valid agency actions. *Dirt, Inc. v. Mobile County Commission,* 739 F.2d 1562 (11th Cir. 1982). The notice in the case below did not adequately apprise Petitioner, and other like persons, of the potential liability present in the case and the possibility of rule modification. Respondent, in assigning such liability and modifying its Rule 30-C, was acting beyond its jurisdictional authority. The failure to provide Petitioner with notice and a hearing compatible with due process also denies Petitioner due process by permitting Respondent to act beyond its jurisdictional authority.

Agencies cannot depart from their own regulations if prejudice results. So long as a regulation is extant, it has the force of law, *United States v. Nixon,* 418 U.S. 683 (1974), even where the internal procedures are more rigorous than otherwise would be required. *Morton v. Ruiz,* 415 U.S. 199 (1974). An amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rulemaking procedures. *Montgomery Ward & Co. Inc., v. Federal Trade Commission,* 691 F.2d 1332 (9th Cir. 1982). Amendment of an administrative rule in a manner not consistent with appropriate rulemaking proce-

dures denies affected persons due process, as such action would fail to provide the public with proper notice of the proposed rule change. *See Ruangswang v. Immigration and Naturalization Service,* 591 F.2d 39 (9th Cir. 1978).

In the proceeding below, Respondent admittedly departed from its own Rule 30-C, without prior notice. Prejudice certainly resulted, as Petitioner, due to this departure, now has an approximately $2 million liability that would not have otherwise existed. The "case-specific modification" of Rule 30-C was without notice and did not follow any of the procedures previously followed to amend Rule 30-C. This constitutes a clear denial of due process.

CONCLUSION

WHEREFORE, Petitioner hereby respectfully requests that this Court grant the Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia, for the reasons cited herein above.

Respectively, submitted,

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APPENDIX

APPENDIX A

Final Order of the Supreme Court of Appeals of West Virginia of November 6, 1985

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 6th day of November, 1985, the following order was made and entered, to-wit:

Columbia Gas of West Virginia, Inc., a corporation
Case No. 83-348-G-30C

National Steel Corporation
vs.
The Public Service Commission of West Virginia

Upon an appeal from, suspension and review of the final order of the Public Service Commission of West Virginia made and entered on July 10, 1985.

The Court having maturely considered the petition and exhibits; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final order complained of; the statement of reasons for the entry of its order of the 10th day of July, 1985, filed herein by the respondent, Public Service Commission of West Virginia on October 31, 1985; and the oral argument of counsel on the 5th day of November, 1985, the date fixed by the Court for hearing upon the aforesaid petition; is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby denied.

It is further ordered that leave be, and the same is hereby, granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia.

A True Copy

Attest:

Clerk Supreme Court of Appeals

APPENDIX B

Orders of the Public Service Commission of West Virginia, dated October 31, 1984, December 28, 1984, and July 10, 1985.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 31st day of October, 1984.

CASE NO. 83-348-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Application to change rates,
effective November 1, 1983,
according to Rule 30C, General
Order No. 183.4, Purchased Gas
Application.

CASE NO. 84-100-G-SC

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.
Proceeding Upon the Commission's
Own Motion.

FINAL ORDER

APPEARANCES

Charles R. McElwee, Thomas E. Morgan and Andrew J. Sonderman, appearing on behalf of Columbia Gas of West Virginia, Inc.;

Richard E. Hitt and Mark Thessin, Legal Division, appearing on behalf of Commission Staff;

Denise Goulet and Billy Jack Gregg, of the Consumer Advocate Division of the Public Service Commission;

J. Randolph Cox and Lee F. Feinberg, appearing on behalf of Weirton Steel Corporation; and

John J. Carrara and Thomas M. Hanna, appearing on behalf of Westvaco Corporation.

PROCEDURE

On August 10, 1983, Columbia Gas of West Virginia, Inc. (Columbia) filed a Rule 30C application for recovery of increased purchased gas costs with the Public Service Commission in accordance with the Commission's General Order No. 183.4, issued on June 26, 1979. The Company requested a purchased gas adjustment (PGA) which would permit Columbia to recover the total projected expenses of $236,628,100 for the twelve-month period beginning November 1, 1983 and a prior period underrecovery of $5,743,829 experienced during the twelve months ending June, 1983.

Due to the complex nature of the underlying issues, the substantive hearings in this case were delayed to allow the parties adequate time for preparation. By order issued on October 14, 1983, the Commission established the procedure for October 24, 1983 hearings on matters concerning the establishment of an interim rate and January 9, 1984 hearings on the case in chief.

On October 24 and 25, 1983, the Commission conducted hearings to determine an appropriate interim rate. On November 14, 1983, the Commission established an interim purchased gas cost (PGA) increment which included a projected gas cost per volume of sales of $5.043 per Mcf, an ACA increment which reflected the Company's stated underrecovery for the twelve months ending June 30, 1983, and an adjustment for tax effects. This interim PGA increment became effective November 1, 1983, subject to refund.

Hearings concerning the case in chief were conducted January 9, 1984 through January 11, 1984. At this time, Columbia presented the testimony of R. G. Stalnaker and

J. R. Lee; Staff presented the testimony of David J. Ellis; Consumer Advocate presented the testimony of W. E. Bennett and E. R. duPont; and Weirton Steel Corporation presented the testimony of M. A. Wilkinson and T. W. Merrill, Jr. At the conclusion of these hearings, parties submitted simultaneous initial and reply briefs on all relevant issues.

On February 22, 1984, the Commission Staff filed a petition to reopen the proceedings to receive further evidence and to establish certain associated proceedings to evaluate the adequacy of Columbia's efforts to obtain cheaper gas supplies that were offered by Ashland Exploration, Inc. (Ashland). Furthermore, Staff contended that Columbia's failure to reveal the existence of Ashland's offer within its Rule 43 data, response to data requests, or supporting testimony may violate Commission's General Order No. 185.7, and the silence of James R. Lee, Columbia's witness with respect to gas purchasing practices, regarding this opportunity, may be tantamount to the giving of false testimony to the Commission.

By order issued March 2, 1984, the Commission granted Staff's motion to reopen the 30C proceeding to evaluate this additional evidence. Furthermore, the Commission initiated a new proceeding, Case No. 84-100-G-SC, for the purpose of determining the reasonableness of Columbia's practices and the appropriateness of associated sanctions. The matters were consolidated and scheduled for hearing on Thursday, March 22, 1984. In response to a joint motion, these hearings were rescheduled for Thursday, March 29, 1984.

These additional hearings were convened on March 29 and March 30, 1984. Staff presented the testimony of L. Eugene Dickinson, Director of Gas Sales for Ashland Exploration, Inc., and Columbia presented the testimony of James R. Lee. At the conclusion of these hearings, all parties were given the opportunity to submit initial and reply briefs on the relevant issues affecting the Rule 30C application as well as other issues presented by the show cause proceeding.

On May 11, 1984, Columbia petitioned the Commission to increase its actual cost adjustment increment to provide for accelerated recapture of its underrecovery. The petition requested that this Commission reduce Columbia's projected underrecovery balance as of June 30, 1984 to zero before the beginning of the next PGA period by permitting the Company to apply an increased ACA surcharge factor to sales during the months of May through October of 1984. The increased ACA surcharge was designed to recover approximately $4,152,556. (See Revised Exh. B, Sch. No. 2, Sheet 2 of 3, Columbia Petition, May 11, 1984). All parties to the proceeding were provided the opportunity to comment on this petition by the close of business on May 25, 1984.

BACKGROUND AND ISSUES

The purpose of this proceeding is to determine a reasonable and appropriate purchased gas cost increment to be included in Columbia's tariff sheets. This established increment should reflect Columbia's reasonable purchased gas expenses for the twelve month period projected from November 1, 1983, its prior underrecovery experienced during the twelve month period ending June 30, 1983, plus an adjustment for tax effects.

The following issues concerning Columbia's PGA were raised at the January hearings:

1. The reasonableness of Columbia's basic purchased gas costs, including the propriety of Columbia's inclusion of amortized start-up costs of $194,000 associated with synthetic natural gas (SNG) supplies in light of recent Commission decisions to limit Columbia's recoverable SNG costs.

2. Columbia's compliance or non-compliance with the standard of care to be exercised in its natural gas purchasing practices, as established by the Commission's decisions in Case Nos. 80-336-G-30C, 81-366-G-30C and 82-379-G-30C, and by the Legislature in *Code* §24-2-4c.

3. The appropriateness of suggested modifications to the current methodology for determining an actual cost adjustment increment (ACA) for the allocation and collection of underrecoverable from Columbia's customers.

4. The appropriateness of suggested modifications in the Commission's current method of determining a PGA and assigning utility rates to customers.

The March 29 and March 30, 1984 hearings presented issues related to Columbia's procurement practices with regard to volumes available from Ashland Exploration, Inc. One issue is whether Columbia failed to make a good faith effort to procure cheaper supplies of natural gas that were offered by Ashland, and whether Columbia's actions justify repricing of Columbia's PGA for non-compliance with the standards of care enunciated in prior Columbia 30C cases and *Code* §24-2-4c. Furthermore, since the existence of this Ashland offer was not revealed within Columbia's Rule 43 data, Columbia's response to various data requests, or in Columbia's supporting testimony given at the prior proceedings, related issues address the appropriateness of various sanctions arising from Columbia's conduct.

After the conclusion of all of the hearings, Columbia petitioned the Commission for an accelerated recapture of its June 30, 1983 underrecovery balance. Since Columbia's petition represents a deviation from the existing method employed by this Commission in making actual cost adjustments, we will address whether this accelerated recapture of underrecovery should be approved by the Commission under the circumstances.

DISCUSSION

I. Projected Gas Costs in Columbia's PGA

Columbia's projected gas cost from November 1, 1983 through October 31, 1984 was established to be $5.043 per Mcf in the Commission's Interim Order. This purchased gas cost was derived by dividing the total cost of purchased gas for that period of $236,628,100 by the projected sales volume of 46,919,600 Mcf. (See Appendix A, Sheet

1 of 3, Interim Order, November 14, 1983). Though Columbia's supporting data lists a slightly higher total cost of purchased gas ($236,634,100) for the twelve-month period, its projected gas cost per Mcf of sales is also $5.043 per Mcf. (Columbia Exh. No. 3, Schedule No. 2, Sheet 2).

The only issue raised by the parties in regard to Columbia's projected gas cost concerned the inclusion of $194,300 for the amortization of deferred start-up costs associated with the production of Synthetic Natural Gas (SNG) in Columbia's current gas costs.

Columbia asserts that the $194,300 for the amortization of SNG costs deferred in prior Commission cases was properly included in this purchased gas cost recovery rate. These deferrals resulted from start-up costs experienced during the first years of operation of the Green Springs facility by Columbia LNG Corporation which were amortized by the Commission over a twenty-five year period in *Columbia Gas of West Virginia, Inc.*, Case No. 8000, 53 ARPSCWV 559 at 576 (1976). This decision was reaffirmed in subsequent Commission cases involving Columbia, Case No. 9147, 66 ARPSCWV 488 (1978) and Case No. 79-088-G-42T, 68 ARPSCWV 293 (1980). Columbia contends that the Commission's recent decision to reprice SNG volumes purchased by Columbia in Case Nos. 80-336-G-30C, 81-366-G-30C and 82-379-G-30C does not exclude the recovery of these deferred SNG start-up and depreciation expenses that were authorized by the Commission in prior cases. (See Columbia Exh. No. 3, Schedule 4; RGS Exh. C, p. 9; Columbia Initial Brief, pp. 9-11).

The Staff notes that the recent Commission decisions have repriced SNG volumes to reflect the average Columbia Gas Transmission Corporation rate, with adjustments for transportation. The Staff's position is that the additional allowance of nearly $200,000 per year for depreciation and amortization of the SNG facilities and start-up costs of the Green Springs plant would result in a total SNG cost which exceeds the repricing standard and would therefore be contrary to the evidence and language of Case

Nos. 80-336-G-30C and 81-366-G-30C. (See Staff Exh. No. 3, pp. 5-9; Staff Initial Brief, pp. 16-18).

We are of the opinion that Columbia's projected gas costs properly included $194,300 for the amortization of SNG costs deferred in prior Commission cases. The rationale for repricing of SNG (in Case Nos. 80-336-G-30C and 81-366-G-30C) volumes was based on the established lack of need for SNG supplies. We repriced SNG volumes according to the average CGTC rate to alleviate the burden placed on consumers by Columbia's continued purchase of these unneeded and more expensive supplies. Since the amortized start-up costs at issue have previously been found reasonable and their recovery deferred by the Commission, we do not find that the continued allowance of these deferred start-up costs are unreasonable under the circumstances. Therefore, we shall permit the inclusion of these deferred charges in Columbia's PGA.

Review of Columbia's rates and charges reveals that Columbia's basic purchased gas cost of $5.043 per Mcf accurately reflects Columbia's projected actual cost of gas and projected sales, with an appropriate repricing adjustment for SNG volumes purchased through March 31, 1984, when Columbia's SNG supply contract expired. Since we continue to hold that this SNG contract is unreasonable and unnecessary, we find that Columbia's projected PGA accurately reflects Columbia's basic cost of purchased gas.

II. Columbia's Compliance With Statutory and Commission Standard of Care

In recent Columbia 30C proceedings, this Commission has maintained that Columbia Gas of West Virginia, Inc. has engaged in purchasing practices and management practices which do not adequately promote the interests of Columbia's jurisdictional customers. (See Final Order of the Commission in Joint Cases 80-336-G-30C and 81-366-G-30C at p. 52, June 28, 1982). To remedy the situation, this Commission established the following standards of care which Columbia must satisfy in subsequent 30C cases:

1. Columbia is to let out bids for the purchase of some significant quantity of natural gas supplies needed to fulfill its customer requirements.

2. Columbia is to make a substantial effort to purchase West Virginia produced natural gas.

3. Columbia must demonstrate that dependable, lower priced supplies of natural gas are not readily available from other sources, and that any contracts between Columbia and a corporate affiliate or combination of corporate affiliates are not detrimental to the customers of Columbia. If this standard is not satisfied by Columbia, the Commission indicated that it may choose to limit any proposed increase to a level which reflects the reasonable cost of natural gas which is determined to be readily available in the State of West Virginia.

4. In future proceedings, Columbia must demonstrate efforts which it has taken to more adequately represent the interest of its West Virginia jurisdictional customers in the Columbia Gas System, as opposed to subordinating the interests of its West Virginia service area to those of the Columbia Gas System as a whole. (Final Order in Joint Cases 80-336-G-30C and 81-366-G-30C, at pp. 56-57).

Similar standards of care have been required for all natural gas utilities by the adoption of Senate Bill No. 117, effective March 12, 1983, which amended provisions of Chapter 24 of the *West Virginia Code* in response to dramatically increasing gas rates during recent years. In particular, *Code* §24-2-4c provides in part:

> At any hearing involving a rate increase for a natural gas public utility, the burden of proof to demonstrate that dependable lower priced supplies of gas are not readily available from other sources and that contracts between the public utility and its suppliers for purchase of natural

> gas are negotiated at arm's length and are not detrimental to customers of the utility's services shall be upon the public utility making application for such change. Should the applying public utility not satisfactorily meet this burden, then the Commission may not authorize an increase greater than that which reflects the reasonable cost of natural gas which is determined to be readily available.

This statute also requires the establishment of a competitive bid program by gas utilities.

The testimony of James R. Lee, Vice President of Supply Planning and Services for Columbia Gas of West Virginia, Inc., addressed Columbia's compliance with these standards. Though Mr. Lee noted that Columbia continues to seek cheaper supplies of natural gas from the various sources shown in Columbia's Rule 43 data, Columbia believes that its greatest opportunity to obtaining supplies of gas at rates that are cheaper than Columbia Gas Transmission Corporation's commodity rate would be through local purchases. Columbia has instituted a local gas procurement program which embodied a comprehensive effort to locate available local gas, including the implementation of a competitive bid program. Four bids were received as a result of the initial bid program and Columbia is proceeding to work out satisfactory arrangements for the purchase of these lower cost gas supplies. Columbia believes that its competitive bid program could provide significant volumes of cheaper gas supplies in the future and will continue to modify and develop this program. (JRL Exh. A, pp. 8-10; Tr. 1/10, pp. 64-67).

Columbia's efforts to obtain local West Virginia gas for its system supply are coordinated by its local gas procurement manager, whose sole responsibility is to secure local supplies of West Virginia gas for Columbia Gas of West Virginia, Inc. In addition to maintaining the bidding procedure, this officer contacts producers by various means to locate cheaper gas supplies for Columbia's system. (Tr. 1/10, pp. 60-63).

For the twelve months ending October 31, 1984, Columbia projected that it would obtain 3,286 Bcf from Cabot Corporation (Columbia Exh. No. 3, Schedule No. 6, Sheet 1 of 14), 181 Bcf from other local producers, and noted the anticipated satisfaction of up to five percent of its supply needs through the purchase of locally produced gas under CGTC's Phase II Transportation Program. By combining these supplies, Columbia anticipated that over eleven percent of its total requirements would be supplied from sources other than Columbia Transmission at a price below Columbia Transmission's commodity rate. (JRL Exh. A, pp. 15-16). However, even with an aggressive local production acquisition program, Mr. Lee testified that Columbia must continue to rely on Columbia Transmission as its primary source of supply in the forseeable future because there is not enough local gas available to serve firm, long-term requirements of Columbia's customers. (JRL Exh. A, p. 16).

David J. Ellis, Director of the Commission's Finance and Special Studies Division, testified that Columbia has not demonstrated its gas procurement practices are as efficient as they could be and that it obtains gas at the lowest possible price. However, he believed that Columbia's evidence has demonstrated a significant change in its previous policy of near total reliance on Columbia Gas Transmission Corporation as a supply source and did not recommend any adjustment to the actual cost levels reflected in Columbia's filings. (See Staff Exh. No. 3, pp. 1-2).

The Consumer Advocate Division of the Public Service Commission contended that Columbia has failed to satisfy its burden of proof that dependable, lower priced supplies are not readily available from other sources and that existing contracts are negotiated at arm's length and are not detrimental to customers. The Consumer Advocate asserted that Columbia has made little effort to obtain non-affiliated gas supplies from sources other than local producers and thus ignored major gas markets. Furthermore, CAD asserted that Columbia's efforts to acquire locally produced gas were inadequate due to the limited scope of

their program. (See CAD Initial Brief, pp. 9-15). Accordingly, CAD proposed a variety of repricing methodologies.

The Consumer Advocate proposed to reprice certain Columbia volumes on the basis of theoretically available local gas at $3.00 to $3.50 per Mcf. We are of the opinion that the record does not contain adequate justification for the repricing of Columbia's PGA on this basis. Consumer Advocate witness William E. Bennett only ambiguously stated that undeveloped sources of local gas supplies would be available to Columbia if it sought such volumes more aggressively. Mr. Bennett did not recommend that Columbia's volumes be repriced accordingly. (See CAD Exh. WEB-A pp. 5-9, Tr. 1/11, p. 8). Therefore, even if we were to accept CAD's contention that Columbia's local gas procurement program is inadequate, we do not find that the record contains a sufficient basis for repricing Columbia's PGA.

The Consumer Advocate also asserted that Columbia failed to adequately investigate the availability of off-system purchases which were sold as surplus non-affiliated interstate pipeline supplies and suggested that the weighted average and volumes of the gas which other local distribution companies were able to purchase from the surplus market could serve as a reasonable basis for repricing Columbia's gas under *Code* §24-2-4c. (Tr. 1/10, pp. 135-139, 149-151). The weighted average cost of such transactions was represented to be $3.86 per Mcf. (See Consumer Advocate Exh. ERD-1).

We do not accept this basis for repricing for three reasons. First, there is not a showing that this type of supply is reasonably available since it is not apparent that adequate transportation of these surplus volumes can be arranged in a cost effective manner. (Tr. 1/10, pp. 34-36). Second, it is not established that such volumes could be attained at a rate that is cheaper than CGTC's commodity rate of $4.18 per Mcf since the analysis of CAD witness Edmund duPont omitted necessary transportation costs and associated shrinkage charges in some transactions (Tr. 1/

10, pp. 126-128, 137). Third, since the surplus market represents an intermittant supply source instead of a continuous supply of gas, Columbia's decision to pursue reliable, constant gas supplies which are perceived to be more cost effective in the long run appears to be a reasonable management decision.

Finally, the Consumer Advocate urges the Commission to reduce the demand cost included in Columbia's rates because Columbia has apparently determined that the total daily entitlement (TDE) level of demand included in Columbia's service agreement with Columbia Transmission was, in fact, too high and should be reduced. (Tr. 1/9, p. 71). Columbia requested that its TDE level be reduced in February of 1983, but the Consumer Advocate asserts that the evidence indicates a reduction should have been requested earlier. (CAD Initial Brief, 2/22, pp. 27-31).

Even if we adopt CAD's position that Columbia improperly failed to reduce its TDE's during prior periods, there is not an adequate basis in the record for repricing Columbia's PGA. Since CGTC's other customers are also in the process of reducing TDE's as a result of a perceived permanent reduction in demand throughout the system, Columbia Gas Transmission Corporation's fixed costs will necessarily be recovered over a smaller number of demand units. As a result, it is uncertain what benefit will result to Columbia from reducing its total daily entitlements. (See Tr. 1/9, pp. 19-20). Additionally, due to the speculative nature of the management decision to adjust its TDE's, we believe that the CAD's recommendation effectively punishes Columbia for making a determination to take a positive rate reducing step for the potential benefit of its customers, thereby deterring such actions in the future.

In summation, we are satisfied that the evidence in this case establishes that Columbia is actively seeking alternative gas supplies to displace higher priced CGTC supplies and the projected gas supplies which comprise Columbia's purchased gas costs represent the lowest priced reliable supplies of gas that are reasonably available to Columbia

Gas of West Virginia during the period in question. Therefore, Columbia has satisfied its burden of proof required under prior 30C cases and *Code* §24-2-4c. Furthermore, even if Columbia failed to satisfy its burden, we find that the record does not contain an adequate basis for repricing Columbia's PGA for failure to obtain reasonably available lower-priced supplies of gas.

III. Columbia's Acquisition Practices and Associated Issues Regarding Ashland Exploration, Inc. Volumes

By letter dated October 20, 1983, Ashland Exploration, Inc. offered to sell certain volumes of its production from Martha, Kentucky gas fields to Columbia Gas of West Virginia, Inc. This gas was to be delivered directly to Columbia Gas of West Virginia's Huntington market area. The initial quantity of gas available through this offer would be over 1800 Mcf per day and the ultimate maximum quantity to be delivered under the arrangement would be 5000 Mcf per day. The maximum price for this gas was to be the lesser of CGTC's commodity price or $3.40. This offer represented that if agreement could be reached, Ashland could begin delivery of these volumes within six to eight months. (See Staff Exh. 1-A).

The initial response of the purchasing agents for the Columbia Gas of West Virginia was to investigate the possibility of purchasing these gas volumes for either Columbia Gas of Kentucky or Columbia Gas of West Virginia both of which are distribution companies within the Columbia Gas System. (Tr. 3/29, pp. 32-36). These primary purchasing agents, including Mr. Lee, are officers of all seven distribution companies within the Columbia Gas System. (Tr. 3/29, p. 160). During the course of the negotiations, Columbia officials indicated to Mr. L. Eugene Dickinson, Director of Gas Sales for Ashland, that either Columbia Gas of Kentucky or Columbia Gas of West Virginia would purchase the gas. Mr. Dickinson interpreted this representation to mean that Columbia Gas System officials would determine which of the two distribution

companies would receive the gas. (Tr. 3/29, p. 34). On February 2, 1984, a proposed contract was submitted to Ashland on behalf of Columbia Gas of Kentucky for the purchase of the Martha Field production. Ashland determined that the proposed purchase of gas by Columbia Gas of Kentucky was not as desirable as a sale to Columbia Gas of West Virginia, and Mr. Dickinson contacted the Staff of the Public Service Commission of West Virginia to discern what options were available to Ashland. (Tr. 3/29, pp. 34-39).

On the basis of the information provided by Mr. Dickinson, Staff filed the February 22, 1984 petition to (1) force Columbia Gas of West Virginia to negotiate in good faith with Ashland for the purchase of these cheaper gas supplies; (2) determine if Columbia Gas of West Virginia's actions warrant repricing of its PGA pursuant to *Code* §24-2-4c and prior Commission orders for failing to procure cheaper supplies of natural gas which were reasonably available; and (3) investigate Columbia Gas of West Virginia's failure to reveal the existence of the Ashland offer at the January hearings.

On March 8, 1984, Columbia Gas of West Virginia, Inc. and Ashland Exploration, Inc. entered into a contract for the sale of these volumes. (See Stipulation Exh. No. 1; Tr. 3/29, pp. 44-46). Though the shared management of Columbia Gas distribution companies initially sought to obtain these volumes on behalf of Columbia Gas of Kentucky, Inc., Mr. Dickinson testified that the signing of the contract was not significantly delayed as a result of the actions of Columbia Gas of Kentucky or Columbia Gas of West Virginia (Tr. 3/29, p. 47).

The evidence revealed that three matters must be resolved before deliveries can commence under the contract. First, the magnitude of volumes delivered under the agreement require that Ashland construct larger cleaning facilities, which are estimated to require up to eight months to construct. Second, Ashland will need to construct an additional one-half mile of pipeline to connect its existing

facilities to the Columbia Gas of West Virginia distribution facilities, which would take a matter of weeks. Third, Ashland must obtain a certificate of public convenience and necessity to construct facilities across state lines from the Federal Energy Regulatory Commission (FERC) since this sale requires the transfer of gas in interstate commerce. Mr. Dickinson estimated that four to six months would be required to obtain FERC approval (Tr. 3/29, pp. 45-48).

Columbia Gas of West Virginia's shared management asserted that it sought to obtain the Ashland volumes on behalf of the Kentucky distribution company as well as the West Virginia distribution company because the purchasing officers overseeing the negotiations, including Mr. Lee, were charged with locating and evaluating gas supplies for all of distribution companies within the Columbia Gas System. Therefore, in addition to acting as the bargaining arm of Columbia Gas of West Virginia, they had a dual responsibility to seek viable supply sources for other Columbia Gas distribution systems, including Columbia Gas of Kentucky. This dual role was further complicated by the fact that in a recent rate case the Public Service Commission of Kentucky had directed Columbia Gas of Kentucky to obtain more local gas from nonaffiliated producers. (Tr. 3/29, pp. 160-163). It was asserted that Columbia Gas of West Virginia's shared management proceeded to evaluate the availability of these volumes on behalf of both distribution systems and reached a determination to issue a proposed contract on behalf of Columbia Gas of Kentucky.

After presentation of the evidence, Staff asserted that there was insufficient factual basis to pursue remedial measures arising from Columbia Gas of West Virginia's failure to make a good faith effort to obtain reasonably available, lower priced supplies of natural gas, particularly since the contract had in fact been consummated. The Staff also contended that other forms of relief to force Columbia Gas of West Virginia to negotiate in good faith for these volumes had likewise become inappropriate. (Staff Initial Brief, May 4, 1984; Tr. 3/29, p. 100). The CAD

asserted that Columbia Gas of West Virginia failed to make a good faith effort to obtain the lower priced Ashland volumes until it had no choice in the matter and recommended a full gamut of remedial sanctions, including repricing of certain volumes in Columbia Gas of West Virginia's PGA pursuant to *Code* §24-2-4c. (CAD Initial Brief, May 4, 1984, pp. 4-12). Weirton Steel Corporation supported CAD's arguments, contending that prompt response by Columbia Gas of West Virginia could have resulted in some volumes being delivered as early as the summer of 1984. Therefore, Weirton suggests that the Commission reprice a portion of Columbia Gas of West Virginia's volume (up to 1.8 Bcf) accordingly. (Weirton Reply Brief, 4/18, pp. 1-2).

We recognize that if Columbia Gas of West Virginia had acted upon the Ashland Offer as if it were independent from the other distribution companies within the Columbia Gas distribution system, it would have proceeded to negotiate for the Martha Field volumes without involving Columbia Gas of Kentucky. The reluctance and inability of the shared management of Columbia Gas of West Virginia to effectively advocate actions for the benefit of the customers of Columbia Gas of West Virginia, Inc., even though it may detrimentally affect another arm of the Columbia System, is one of the primary factors which necessitated the development of the Commission's standard of care set forth in Section II of this order (evolved in pages 48-58 of the Commission's June 28, 1982 order in Case Nos. 80-336-G-30C and 81-366-G-30C), as well as support the subsequent sale of Columbia Gas of West Virginia to a nonaffiliated entity. However, even though the shared management of Columbia Gas of West Virginia initially sought to obtain the gas for Columbia Gas of Kentucky, the end result of the efforts to obtain these supplies for Columbia Gas of West Virginia were ultimately timely and reasonable. Therefore, we find that Columbia of West Virginia's actions in obtaining the Ashland volumes do not constitute a failure to procure reasonably available and dependable lower priced supplies for gas. Furthermore,

even if we were to accept the argument that Columbia's response to the offer did not comply with the utility's standards of care regarding gas procurement practices, we find that the chronology of events which must occur prior to delivery does not adequately support the repricing remedies proposed by CAD and Weirton Steel Corporation.

Columbia Gas of West Virginia's failure to reveal the existence of the Ashland offer in response to associated data requests, in updating its Rule 43 data and through the testimony of its witnesses appears to be a result of Columbia Gas of West Virginia's narrow construction of the pertinent questions and the limited scope of its responses. For example, Mr. Lee testified that in response to the Chairman's request at the January hearings Columbia Gas of West Virginia's Rule 43 data which summarized contacts with various suppliers during the twelve month period ending June 30, 1983, he merely updated the Commission with respect to the present status of the previously specified contacts. Any potential gas source which arose subsequent to June 30, 1983 was thus not included in his discussion. (Tr. 3/29, pp. 167–170).

After review of the testimony presented by Mr. Lee at the show cause proceeding, we are of the opinion that the evidence fails to establish that Mr. Lee falsely gave testimony before the Commission or intentionally misled or deceived the Commission. Therefore, we do not determine that sanctions for Mr. Lee and Columbia Gas of West Virginia are appropriate in this case. However, we remain concerned that Columbia Gas of West Virginia strictly and narrowly answered questions in a manner which would not reveal information that Columbia Gas of West Virginia knew or should have known was of interest to the Commission and the various parties to the case. Since such a narrow construction fails to accomplish the aim of the Commission's discovery process to provide for a full and complete development of pertinent facts and information within the Commission's time constraints, we place Columbia Gas of West Virginia on notice that future data requests and inquiries are expected to be broadly construed

so as to permit the unencumbered development of relevant facts before this Commission.

IV. ACA Considerations

The interim order in this case established an actual cost adjustment (ACA) increment according to the "Westvaco" method adopted in *Columbia Gas of West Virginia, Inc.*, Case No. 82-379-G-30C. This method provides for an allocation of the prior period's underrecovery according to rate schedules, as described in the interim decision (Interim Order, pp. 13, 14, November 14, 1983).

At the January hearings, Staff made a correction regarding the effect of Kaiser Aluminum Company's shift from rate schedule LV-2 to rate schedule LV-1, effective November 1, 1983 (Tr. 1/11, p. 45). Because the corrected calculations of the respective ACA increments under the "Westvaco" method are minor and are the only changes we are approving vis-a-vis the interim rates, we will not require the Company to change its rates at this time to reflect the change. Columbia shall reflect the appropriate Kaiser Aluminum underrecovery and the effect of Kaiser's shift from LV-2 to LV-1 in future over/underrecovery calculations.

No party disputes the fact that Columbia experienced an underrecovery of $5,743,829 from July, 1982 through June, 1983 and no challenges were raised to Staff's recalculated ACA increments under the "Westvaco" method. However, various parties addressed the fairness of the current ACA structure and suggested alternate methodologies for allocating over/underrecoveries to Columbia's customers. These proposals are summarized as follows:

1. Columbia advocated the adoption of a total company ACA methodology in place of the existing rate schedule methodology used by the Commission. The proposed method would simply divide the total underrecovery by the projected sales volume to determine a uniform factor for each Mcf. (See Columbia Initial Brief, 2/22/84, pp. 7–8).

2. Staff proposed that the Commission continue to assign underrecoveries under the Westvaco rate schedule

methodology adopted in Case No. 82-379-G-30C, and proposed to track the underrecoveries in the LV-1 and LV-2 rate schedules and make each industrial customer directly responsible for past underrecoveries attributable to that customer. (See Staff Exh. No. 5, pp. 4-5; Tr. 1/11, 18-20). The objective of this proposal was to reduce the burden placed on remaining industrial customers in a rate schedule when other customers in that schedule significantly reduce their gas consumption or go off the system during a period of under-recovery. Columbia agreed that such measures should be taken to provide stability to remaining customers if the Commission does not adopt its "total company" ACA approach. (RGS Exh. D, p. 11).

Westvaco Corporation and Weirton Steel Company contended that Staff's recommendation amounted to retroactive ratemaking since industrial customers would be required to make payments to Columbia for natural gas that was consumed in a prior period. Thus they contended that Staff's proposal was prohibited under the principles enunciated in *Virginia Electric and Power Company v. Public Service Commission of West Virginia,* __ W.Va. __ , 248 S.E.2d (1978). Furthermore, it was contended that this method would further skew the industrial customer's ability to evaluate future gas costs since there would be an uncertainty with regard to the cost of current gas consumption. (See Westvaco Initial Brief, 2-22-84, pp. 6-8; Weirton Reply Brief, 3-13-84, p. 7).

3. If Staff's proposal is adopted by the Commission, Weirton Steel proposed that the Commission restructure industrial customers' obligations to repay underrecoveries. Weirton proposed that each industrial customer be required to repay its portion of the underrecovery over the same volume of gas in which the underrecovery accrued or repay its portion over a minimum period of three years. (See Weirton Initial Brief, 2/22/84, p. 14.) Columbia agreed that an extended payment period of 18-24 months for industrials to repay underrecovery balance may be reasonable if it included an appropriate finance charge. (Tr. 1/11, p. 102; Columbia Initial Brief, 2-22-84, pp. 8-9).

We reject Columbia's proposed total company ACA methodology in this case. Since industrial load loss is projected to occur regardless of whether a rate schedule or a total company methodology is utilized and the total company method permits industrial customers to pay less than their allocated share of fixed demand charges and requires that general residential customers absorb these costs, we do not find that the adoption of a total company ACA methodology is justified in this case.

We find that Staff's proposal to make each industrial customer under rate schedules LV-1 and LV-2 directly responsible for the underrecoveries attributable to that customer during prior periods is reasonable and should be adopted by this Commission. The effect of our current ACA by-rate-schedule method places an unjust burden on remaining industrial customers in a rate schedule when a customer in that schedule significantly reduces its gas consumption or goes off the system during a period of underrecovery. By making each industrial customer directly responsible for underrecoveries experienced as a result of that customer's individual consumption, the inequities which result from the current situation would be diminished. Adoption of this methodology should also alleviate cash flow problems which are experienced by the distribution company as a result of excessive underrecovery balances.

We also determine that this tracking methodology should further be extended to provide that customers served under IUS rate schedules be held responsible for over/underrecoveries as they accrue. We do not determine that this practice should be extended to general service customers in light of the administrative inconvenience of tracing actual over/underrecoveries specifically to each general service and residential customer. Therefore, we shall make each IUS and LV customer directly responsible for or entitled to over/underrecoveries as they accrue.

Therefore, we determine that the over/underrecovery balances for each IUS and LV customer shall be deter-

mined as of October 31, 1984, the conclusion of this PGA period. Mountaineer Gas Company (Mountaineer), the successor entity to Columbia Gas of West Virginia which was formed after the recent sale of Columbia Gas of West Virginia stock, shall calculate the comprehensive over/underrecovery balance for each IUS and LV customer during the period from November 1, 1981 (when the Commission's initially began determining ACA's according to rate schedule) through October 31, 1984. These calculations shall be completed by January 1, 1985, and Mountaineer shall inform each IUS and LV customer of any outstanding overrecovery or underrecovery balance by February 1, 1985. Customers shall then be given twelve months in which to pay any remaining underrecovery balance existing as of October 1, 1984 and the company shall be provided an equivalent amount of time to make a refund of any overrecovery balance existing as of October 1, 1984. No interest shall accrue to any party during this initial repayment period.

We determine that Weirton's proposal to establish an extended payment period for the repayment of underrecoveries attributable to each industrial customer is accomodated by the decision above. We do not anticipate that this decision will result in undue hardship to customers since extensive supplier refunds from Columbia Gas Transmission Corporation to Mountaineer shall be forthcoming due to the implementation of a federal appeals court decision in *Interstate Natural Gas Association of America v. FERC*, 716 F2d 1 (D.C., 1983), *cert. den.* 104 S.Ct. 1616. Refunds flowing from that decision could be traced to individual customers based on prior consumption, offsetting outstanding underrecovery balances.

The prohibition against retroactive ratemaking by this Commission does not preclude the Commission from tracking over/underrecoveries to large volume users or other customers. This recommendation is being adopted pursuant to an Actual Cost Adjustment provided under Rule 30C of the Commission's *Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public*

Utilities and Common Carriers by Motor Vehicle. Our existing 30C mechanism, adopted in General Order No. 183.4 (June 26, 1979), establishes an annualized true-up adjustment in the PGA which represents the difference between the actual cost of purchased gas during a prior period and the projected cost of gas from various suppliers at the time of the prior PGA filing. This annualized method was adopted over the pre-existing method of making monthly PGA adjustments, which was deemed inadequate because it resulted in monthly fluctuations in gas rates (see General Order No. 183.4, pp. 4-5, June 26, 1979). Without an actual cost adjustment, the two ways a utility could recover its reasonable purchased gas costs would be (1) through an automatic readjustment of its rates as purchased gas costs increased, which would not provide an adequate ability to review their underlying reasonableness and (2) in a general rate case. Therefore, the ACA increment represents an alternative mechanism to continual reevaluation and readjustment of an appropriate rate or delayed recovery of the principal component of a utility's cost of service. The ACA methodology permits a utility to recover its reasonable purchased gas costs in a timely fashion while protecting consumers from wildly fluctuating unit costs. Since a customer would be responsible to pay the actual cost of gas as used if the PGA were continually readjusted, we find it proper to make over/underrecoveries experienced during the prior period directly attributable to the specific customer.

Westvaco would have us determine that the practice of making specific customers responsible for underrecoveries as they accrue is improper while continuing to uphold the practice of passing through supplier refunds to specific customers on the basis of actual overpayments. We find Westvaco's distinctions are contradictory and unconvincing since both practices constitute price adjustments made to correct inaccuracies which occurred in a prior cost projection. Tracing an underrecovery directly to a customer is in substance no different than directly tracing a refund to that same customer.

Under the provisions of this decision and due to the proximity of time to the conclusion of the PGA period, no adjustment shall be made to the AGA's established by our November 14, 1983 interim decision through October 31, 1984. However, this decision will result in individual allocation of all over/underrecovery balances existing as of October 31, 1984 which are attributed to IUS and LV customers. Therefore, the respective ACA's which have been built into rate schedules LV-1, LV-2, IUS-1 and IUS-2 should be removed from the PGA and associated rates and charges as of October 31, 1984. The ACA contained in the GS (General Service) rate schedule shall remain in effect until modified by subsequent tariffs filed in Mountaineer's next 30C case.

V. Modifications in PGA Determinations and Rate Design

Throughout the course of the hearings, various suggestions and proposals were presented to the Commission which represented modifications of existing methods in determining a PGA and alterations in rate design. These proposals may be summarized as follows:

1. Columbia Gas of West Virginia, Inc., raised the question of whether CGTC demand costs should be allocated to customer classes based on respective class demands rather than allocated by the currently employed commodity basis (per Mcf). (Tr. 1/9, p. 60).

2. Columbia asserted that its future PGA should be permitted to track major changes in purchased gas costs such as semiannual rate determinations of the FERC involving CGTC.

3. Columbia asserted that it should be permitted to project anticipated fluctuations in purchased gas costs in future 30C proceedings instead of relying on an Actual Cost Adjustment for underrecoveries resulting from such changes.

4. Weirton urged the Commission to construct or require Columbia to formulate methods of innovative ratemaking to keep industrial customers on its system. One of Weir-

ton's suggestions is to develop a flex rate which is determined as a function of a corresponding price of an alternate fuel and the ability of the utility to recover its costs through these rates. (See Weirton Steel Exh. No. 1, p. 4; Weirton Steel Exh. No. 2, pp. 4-5; Weirton Initial Brief, 2/22/84, pp. 8-12).

The Commission is of the opinion that the record in this case does not adequately develop a justification for deviating from the existing method of determining a PGA. Specific proposals need to be scrutinized with respect to their effect on the various classes of customers before the Commission could properly evaluate the appropriateness of a reallocation of demand charges by customer class or the adoption of a specific flex rate or other form of innovative ratemaking. We are also unwilling to adopt either of Columbia's suggested alternatives for absorbing subsequent purchased gas cost fluctuations without additional supporting evidence. If any party wishes to pursue these issues in the future, we invite them to address these proposals in future 30C proceedings.

VI. Accelerated Recapture of Columbia's Underrecovery Balance

After the conclusion of all hearings in this case, Columbia petitioned the Commission to increase its ACA increment for the remainder of the rate period to reduce its projected underrecovery balance on June 30, 1984 to zero by October 31, 1984. Columbia proposed that an additional $4,152,556 be recovered through increased ACA surcharges for the months of May through October of 1984 as shown in Exhibit B, Schedule No. 2, attached to Columbia's petition. If Columbia's petition were granted the following increased ACA surcharges would have been applied to volumes sold from May through October:

	GS	LV-1	LV-2	IUS-1	IUS-2
Existing ACA Surcharge per Interim Order	$ .035	$ .301	$ .447	$ .094	$ .039
Proposed Increased in ACA Surcharge	.381	.266	.109	.927	1.255
Proposed ACA Increment	.416	.567	.556	1.021	1.292

Columbia's petition represents a marked deviation from the current actual cost adjustment methodology utilized by the Commission's Rule 30C. Previously, this balance would normally be addressed in Columbia's next purchased gas cost proceeding and recovered over a twelve-month period through the operation of the Commission's Rule 30C mechanism. Though Columbia's underrecovery balance as of June 30, 1980 is substantial and a source of concern, it appears from Columbia's petition that this underrecovery balance is in fact diminishing through October 31, 1984, the beginning of the next PGA period. Furthermore, the underrecovery balance for LV and IUS customers as of October 32, 1984 is being individually assigned and collected pursuant to our ACA decision in Section IV of this order. We therefore find that it is more appropriate to address the remaining underrecovery balance of general service customers during the course of Columbia's next purchased gas cost case.

FINDINGS OF FACT

1. Columbia Gas of West Virginia, Inc. has applied for a new purchased gas cost increment of $5.043 per Mcf for all rate schedules. The Company has stated an underrecovery of $5,743,829 for the twelve months ending June 1983 and total expenses to be recovered through this proceeding of $236,634,100 (Columbia Exh. No. 3, Schedule No. 2, Sheet 2).

2. On November 14, 1983, the Commission established an interim purchased gas cost increment which included a purchased gas cost by volume of sales of $5.043 per Mcf, an ACA increment which reflected the Company's

stated underrecovery for the twelve month ending June 30, 1983, plus tax effects (Interim Order, November 14, 1984, Case No. 83-348-G-30C).

3. The only objection raised by any party to Columbia's projected purchased gas cost was with regard to the inclusion of $194,300 for deferred start-up costs associated with the production of Synthetic Natural Gas (SNG) in Columbia's current gas costs (Staff Exh. No. 2, pp. 2, 7).

4. Though the Commission had neither approved nor disapproved the terms and conditions of the contract between Columbia Gas of West Virginia, Inc. and Columbia LNG Corporation for purchase of SNG volumes, the Commission ordered Columbia Gas of West Virginia, Inc. to defer the start-up costs experienced during the first year of operation of the Green Springs facility by Columbia LNG Corporation and amortized these costs over a twenty-five year period, as opposed to the ten year period provided by contract (*Columbia Gas of West Virginia, Inc.*, Case No. 8000, 53 ARPSCWV 559 at 576 (1976)). This decision was reaffirmed in subsequent Commission cases involving Columbia, Case No. 9147, 66 ARPSCWV 488 (1978) and Case No. 79-088-G-42T, 68 ARPSCWV 293 (1980).

5. In recent cases, the Commission has determined that the SNG volumes are unnecessary and the contract terms are unreasonable. Therefore, in determining recoverable purchased gas costs this Commission has repriced SNG volumes to reflect the average Columbia Gas Transmission Corporation rate, with adjustments for transportation (*Columbia Gas of West Virginia, Inc.*, Case Nos. 80-336-G-30C and 81-366-G-30C, June 28 - 1982; *Columbia Gas of West Virginia, Inc.*, Case No. 82-379-G-30C, October 21, 1983).

6. The SNG supply contract in question expired on March 31, 1984.

7. In this proceeding, Columbia Gas of West Virginia, Inc., is required to "demonstrate that dependable lower priced supplies of gas are not readily available from other

sources and that contracts between the public utility and the suppliers for purchase of natural gas are negotiated at arm's length and are not detrimental to the customers of the utility's services. . .Should the applying utility not satisfactorily meet this burden, then the Commission may not authorize an increase greater than that which reflects the reasonable cost of natural gas which is determined to be readily available. . ." *Code* §24-2-4c.

8. In recent cases involving Columbia Gas of West Virginia, Inc., this Commission has established four standards of care to be complied with by Columbia in future 30C proceedings to promote adequate and efficient gas procurement and management practices. These standards of care are set forth in Part II, *supra.*

9. Columbia Gas of West Virginia, Inc. has implemented a bid program for the purpose of soliciting locally produced supplies of natural gas. Columbia has also employed a local procurement officer whose sole responsibility is to secure local supplies of West Virginia. Both of these steps represents movement from Columbia's near total reliance on Columbia Gas Transmission Corporation as a supply source (JRL Exh. A, pp. 8/10; Tr. 1/10, pp. 63-67).

10. For the twelve months ending October 31, 1984, Columbia projected that it will obtain 3.286 Bcf from Cabot Corporation (Columbia Exh. No. 3, Schedule No. 6, Sheet 1 of 14), 0.181 Bcf from other local producers, and noted the anticipated availability of up to five percent of its supply requirements from local suppliers under Columbia Gas Transmission Corporation's Phase II Transportation Program. By combining these sources, Columbia anticipated that over eleven percent of its total supply requirements would be provided from sources other than Columbia Transmission at a price below Columbia Transmission's commodity rate (JRL Exh. A, pp. 15-16).

11. By letter dated October 20, 1983, Ashland Exploration, Inc. offered to sell certain volumes of its Kentucky volumes directly to Columbia Gas of West Virginia's Huntington market area. These volumes would initially be over

1800 Mcf per day, with a maximum quantity of 5,000 Mcf per day in the future. (See Staff Exh. 1-A).

12. This Ashland offer was not disclosed by Columbia Gas of West Virginia, Inc. at the January hearings or in response to any data requests made by the respective parties.

13. Columbia Gas of West Virginia, Inc. and Ashland Exploration, Inc. entered into a contract for the sale of the Kentucky volumes on March 8, 1984. (See Stipulation Exh. No. 1; Tr. 3/28, pp. 44-46).

14. Before deliveries of the Ashland supplies can commence, Ashland must construct larger cleaning facilities to accommodate the increased volumes, construct an additional one-half mile of pipeline to correct existing Ashland facilities to Columbia Gas of West Virginia, Inc.'s distribution facilities and Ashland must obtain a certificate of public convenience and necessity from the FERC to construct facilities for the transportation of natural gas across state lines. The construction was estimated to require up to eight months to complete and FERC approval was estimated to require four to six months (Tr. 3/29, pp. 45-48).

15. Columbia Gas of West Virginia, Inc. experienced an underrecovery of $5,743,829 during the twelve months ending June 30, 1983.

16. This Commission allocates over/underrecoveries to customers by a rate schedule methodology, as modified by the "Westvaco" method, adopted in Case No. 82-379-G-30C.

17. The effect of our current ACA by rate schedule over/underrecovery methodology places an unjust burden in industrial customers remaining in a rate schedule when a customer in that schedule significantly reduces its gas consumption and goes off the system during a period of underrecovery. If each industrial customer is made directly responsible for underrecoveries experienced as a result of the customer's consumption, this inequity would be alleviated.

18. After the conclusion of the hearings, Columbia petitioned the Commission to increase its ACA increment for the remainder of the rate period to reduce its projected underrecovery balance on June 30, 1984 to zero by October 31, 1984. Columbia's proposal requested that an additional $4,152,556 be recovered through increased ACA surcharges for the remainder of the PGA period.

CONCLUSIONS OF LAW

1. This Commission shall continue to reprice SNG volumes purchased by Columbia Gas of West Virginia, Inc. to reflect the average Columbia Gas Transmission Corporation rate, with adjustments for transportation, through the expiration of the SNG supply contract on March 31, 1984.

2. We determine that Columbia's projected purchased gas costs properly included the $194,300 amortization of start-up costs experienced during the first year of operation of the Green Springs facility by Columbia LNG Corporation. Our recent decisions to reprice the recoverable purchased gas costs associated with SNG costs were not intended to disallow or limit the recovery of these deferred start up costs, which were amortized over a twenty-five year period in Case No. 8000, 53 ARPSCWV 559 (1976).

3. Columbia's basic purchased gas cost of $5.043 per Mcf accurately reflects Columbia's projected cost of gas and sales, as repriced in accordance with the SNG repricing decision in *Columbia Gas of West Virginia, Inc.*, Case Nos. 80-336-G-30C and 81-366-G-30C, (October 30, 1981).

4. We determine that the evidence in this case establishes that Columbia is actively seeking alternative gas supplies to displace higher priced Columbia Gas Transmission Corporation's supplies and the projected gas supplies which comprise Columbia's purchased gas costs represent the lowest priced reliable supplies of gas that are reasonably available to Columbia Gas of West Virginia, Inc. during the period in question, Therefore, Columbia

has satisfied its burden of proof required under *West Virginia Code* §24-2-4C and prior Commission cases.

5. Furthermore, if Columbia's gas procurement practices failed to satisfy its burden under *Code* §24-2-4C and the standards of care established by the Commission in Case No's 80-336-G-30C and 81-366-G-30C, we find that the record does not contain an adequate and appropriate basis for reducing Columbia's PGA for failure to obtain reasonably available lower-priced gas supplies.

6. We determine that the record is insufficient to warrant repricing Columbia's PGA or imposing related sanctions as a result of Columbia Gas of West Virginia, Inc.'s efforts to obtain supplies offered by Ashland Exploration, Inc. to Columbia's Huntington Market area.

7. Columbia's continued reliance in the near future on Columbia Gas Transmission Corporation as a primary source for supply is reasonable in light of its limited ability to obtain volumes from alternative supply sources.

8. We find it reasonable and proper to continue to utilize the ACA by rate schedule methodology, as modified by the Westvaco method adopted in Case No. 82-379-G-30C, for allocating over/underrecovery balances to the respective customers of Columbia Gas of West Virginia, Inc.

9. We find it reasonable and proper to make each industrial customer under rate schedules LV-1 and LV-2 directly responsible for the underrecoveries attributable to that customer, as proposed by Staff. (See Staff Exh. No. 5, pp. 4-5; Tr.1-11, pp. 18-20). We further determine that this methodology should be similarly extended to IUS-1 and IUS-2 customers for similar reasons. We shall, therefore, provide that the comprehensive over/underrecovery balances for each IUS and LV customer be determined from November 1, 1981 through October 31, 1984. Each IUS and LV customer shall be responsible for repayment of any remaining underrecovery balance or shall be entitled to refund of any remaining overrecovery.

10. We do not conclude that tracking prior perod underrecoveries directly to each industrial customer is precluded by the prohibition against retroactive ratemaking by the Commission. Adoption of this recommendation, pursuant to Rule 30C of the Commission's *Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle* represents an alternative mechanism to the continued re-evaluation and readjustment of an appropriate rate to permit a utility to recover its purchased gas costs. Since a customer would be responsible to pay the actual cost of gas as used if the PGA were continually adjusted, we find it proper to assign responsibility for prior period over/underrecoveries in this manner.

11. The June 30, 1984 underrecovery balance addressed in Columbia's petition would normally be addressed in Columbia's next purchased gas proceeding and recovered over a twelve-month period through the operation of the Commission's Rule 30C mechanism. Though this underrecovery balance as of June 30, 1984 is substantial and a source of concern to Columbia, it appears from Columbia's petition that this balance will in fact diminish through October 31, 1984, the beginning of the next PGA period. Furthermore, the underrecovery balance for LV and IUS customers as of October 31, 1984 is being individually assigned and collected pursuant to this decision. We, therefore, determine that it is more appropriate to address this underrecovery balance of general service customers through the course of Columbia's next purchased gas cost case instead of implementing a short term adjustment which dramatically affects rates over a short segment of the PGA period.

12. We, therefore, find it reasonable and proper for Columbia to calculate purchased gas costs as implemented by the Commission's November 14, 1983 Interim Order in this case through October 31, 1984. A new interim rate approved in Case No. 84-460-G-30C shall be effective.

13. After review of the facts and surrounding circumstances, we do not determine that it is appropriate to issue

sanctions against Columbia and its witnesses for failure to reveal Columbia's opportunity to purchase certain volumes from Ashland Exploration, Inc. However, we remain concerned that Columbia's narrow construction placed on certain data requests and inquiries impedes the ability of the Commission and the respective parties to fully develop the facts and underlying issues in Commission cases. Because of this, we place Columbia on notice that future data requests and inquiries should be broadly construed to require the development of relevant facts that are known or should be known to be of interest to the Commission and the various parties in the case.

14. Since the conclusion of these proceedings, Columbia Gas System, Inc.'s interest in Columbia Gas of West Virginia, Inc. has been purchased by Allegheny & Western Energy Corporation. Though Columbia Gas of West Virginia, Inc. continued as a corporate entity after the sale, its name has subsequently been changed to Mountaineer Gas Company (Mountaineer). All directions and obligations created by this order with respect to Columbia Gas of West Virginia, Inc. shall be binding on Mountaineer Gas Company.

ORDER

IT IS, THEREFORE, ORDERED that:

1. The interim purchased gas costs (PGA) approved by Commission Order entered on November 14, 1983, are hereby approved for continuing use through October 31, 1984.

2. On or before January 1, 1985, Columbia Gas of West Virginia, Inc. (Mountaineer Gas Company) shall calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1 and IUS-2 rate schedules during the period between November 1, 1981 through October 31, 1984. Columbia (Mountaineer) shall inform each IUS and LV customer of any outstanding overrecovery or underrecovery balance by February 1, 1985.

3. An IUS or LV customer shall pay any outstanding underrecovery balance determined to exist as of October 31, 1984 within twelve (12) months after notice of the outstanding balance is provided by Mountaineer, without accrual of any interest.

4. Mountaineer Gas Company shall pay any outstanding overrecovery balance determined to exist for IUS or LV customers as of October 31, 1984 within twelve (12) months after notice of the outstanding balance, without accrual of interest.

5. The Executive Secretary of the Commission shall serve a copy of this order upon all parties of record by United States First Class Mail.

6. Mountaineer Gas Company shall provide notice of this decision to all affected IUS and LV customers of Columbia Gas of West Virginia, Inc. and its successor entity, Mountaineer Gas Company, who are not formal parties to this proceeding by sending a copy of this decision to said customers by United States First Class Mail.

A TRUE COPY

TESTE:

HOWARD M. CUNNINGHAM
Executive Secretary

RFW:1c
Chairman McDonald took no part in the consideration of or decision in Case No. 84-100-G-SC.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, in the City of Charleston on the 28th day of December, 1984.

CASE NO. 83-348-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.
Application to change rates, effective November 1, 1983, according to Rule 30C, General Order No. 183.4, Purchase Gas Application.

CASE NO. 84-100-G-SC
COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.
Proceeding Upon the Commission's Own Motion.

COMMISSION ORDER ON PETITION FOR RECONSIDERATION

PROCEDURE

On August 10, 1983, Columbia Gas of West Virginia, Inc. (Columbia) filed a Rule 30C Application for recovery of increased purchased gas costs. After certain modifications, the Company requested a purchased gas adjustment (PGA) which would permit Columbia to recover total projected expenses of $236,628,100 for the twelve month period beginning November 1, 1983, and a prior period underrecovery of $5,743,829 experienced during the twelve months ending June, 1983.

By Order entered November 14, 1983, the Commission set an interim rate which was designed to allow Columbia

to recover its projected expenses as stated above, pending final resolution of the case.

After extensive review of Columbia's purchasing practices and related issues, this Commission entered an October 31, 1984 order which finally approved the interim rates and charged established by the Commission's November 14, 1983 Order for continued use through October 31, 1984. As a part of this Order, this Commission determined that the Company's method of recapturing over/underrecovery balances related to prior period purchased gas costs should be modified to provide for the tracing of over/underrecovery balances to individual customers within the IUS and LV rate schedules. Mountaineer Gas Company, formerly Columbia Gas of West Virginia, Inc., was directed to calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1 and IUS-2 Rate Schedules during the period between November 1, 1981 through October 31, 1984. Mountaineer was to pay any outstanding overrecovery balance or receive payment for any outstanding underrecovery balance within 12 months after notice of such balance is provided. (October 31, 1984 Order, ordering paragraph Nos. 2-4).

On November 13, 1984, a Petition for Reconsideration was timely filed by Mountaineer Gas Company with the Commission. An untimely filed Petition for Reconsideration was submitted by Westvaco Corporation on November 16, 1984. In light of the nature of the concerns raised by Westvaco's Petition, we determine that it is in the public interest to consider Westvaco's arguments.

On December 20, 1984, Mountaineer Gas Company filed a motion to extend the deadline by which it is to calculate the outstanding over/underrecovery balance as of October 31, 1984 for each LV and IUS customer.

DISCUSSION

Mountaineer's Petition for Reconsideration challenges two aspects of the October 31, 1984 decision, both of which

relates to the Commission's modification of the Company's method of recapturing over/underrecovery balances.

First, Mountaineer asserts that the Commission's Order left the repayment schedule of underrecovery balances open-ended over the twelve month repayment period. Mountaineer submits that this enables IUS and LV customers who owe large underrecovery balances to withhold any repayment until the end of the 12 month repayment period, at no interest expense. Mountaineer asserts that such a result would place an excessive burden on its limited financial resources by creating cash flow problems. The Company urges the Commission to modify its order to provide that IUS and LV customers must repay outstanding underrecovery balances in twelve (12) equal monthly installments. (See Mountaineer Petition, pp. 1-3).

The staff's proposal to modify the Company's ACA methodology to track over/underrecoveries to specific IUS and LV customers included the provision that repayment of any outstanding underrecovery balance shall be made in twelve (12) equal monthly installments. This portion of the proposal was consistent with the twelve month amortization of over or underrecoveries embodied in Rule 30C. (See Staff Exhibit No. 3, pp. 4-5).

Upon reconsideration of this matter, we find that our Order should have indicated that IUS and LV customers are to pay any outstanding underrecovery balance in 12 equal monthly payments, without interest, after receiving notification of the outstanding balance. Similarly, our Order should have indicated Mountaineer is required to refund any overrecovery accrued to an individual IUS and LV customer in twelve equal monthly installments after notification of the balance. These clarifications should protect Mountaineer from cash flow problems resulting from our October 31, 1984 decision.

Second, Mountaineer objected to the manner in which we stated our expectation that the payment requirements of the October 31 order would not result in undue hardship to IUS and LV customers. Our decision indicated that

extensive supplier refunds flowing from a Federal Appeal's Court decision in *Interstate Natural Gas Association of American v. FERC*, 715 F.2d 1 (D.C., 1983), *cert denied* 104 S.Ct. 1616, could be traced to individual customers based on prior consumption, offsetting outstanding over-recovery balances. These anticipated supplier refunds were cited as one reason why Weirton's proposal to establish an extended payment period for all LV customers was unnecessary. Mountaineer indicates that our statements could be interpreted to relieve an IUS or LV customer from payment responsibilities to Mountaineer Gas Company if the supplier refunds are not in fact realized before payment begins.

We determine that it is clear that the payment obligation to Mountaineer related to outstanding underrecovery balances is in no manner dependent on the availability of pending supplier refunds. However, we continue to recognize that such supplier refunds, after they are passed on to Mountaineer, would become available sources of funds which may be used to offset prior payment obligations.

Westvaco's Petition for Rehearing requested that further proceedings be convened for the purpose of clarifying the manner in which the underrecoveries for each individual LV-1 and LV-2 customer is to be determined under the Commission's tracking methodology. In support of its petition, Westvaco cited the following as remaining questions:

a) How are underrecoveries of purchased gas costs related to load loss (i.e. demand related underrecoveries) to be distinguished from underrecoveries of commodity related costs?

b) How is one to determine an individual customer's contribution to demand related underrecoveries associated with purchased gas costs?

c) How are underrecoveries for LV-1 and LV-2 customers no longer in existence going to be assigned?

(Westvaco Petition, Item 4, p. 3)

We do not determine that Westvaco's questions justify additional hearings on the application of the methodology. After reviewing the October 31, 1984 Order, we find that these questions are sufficiently addressed or do not warrant further hearing at this time. Our reasons for determining this are reflected in the following responses to Westvaco's questions:

a) Under the methodology adopted by the Commission in assigning over/underrecoveries in this case, underrecoveries of purchased gas costs related to load loss are not to be distinguished from underrecoveries of commodity related costs. Rather, Mountaineer shall continue to utilize the ACA by rate schedule methodology, as modified by the Westvaco method adopted in Case No. 82-379-G-30C, for allocating over/underrecovery balances to the respective customer classes (See Conclusion of Law No. 8, October 31, 1984 Order, p. 33). Under this method, the aggregate demand charges for each twelve month ACA period are allocated to each month according to the proportions share of sales volumes for that period. The demand charges allocated to each month are then treated as a commodity charge in determining the total cost of gas for that month. Therefore, it appears clear that the intent of our October 31, 1984 Order was for Mountaineer to continue to calculate a single over/underrecovery increment for each rate schedule without regard to the factors which make up that underrecovery increment.

b) An individual customer's demand related underrecoveries associated with purchased gas costs are determined on a commodity basis through the extended application of the ACA by rate schedule methodology currently utilized by the Commission. After an over/underrecovery increment is determined for a rate schedule according to the method discussed in answer a), above, the month's underrecovery for each customer within that rate sched-

ule is determined by multiplying this commodity increment by the customer's consumption during that month. Therefore, an individual customer's contribution to demand related costs continue to be determined according to the Westvaco ACA by rate schedule methodology.

c) Under the Commission's orders, Mountaineer shall prepare bills reflecting the underrecoveries for LV-1 and LV-2 customers. The collectibility of bills from customers no longer in existence will depend on a variety of factors, some of which may relate to bankruptcy or contractual concerns. Since we do not yet know the extent and magnitude of uncollected underrecoveries attributed to customers no longer in existence, we find that it is more appropriate to address an equitable manner for assigning these uncollected expenses in future proceedings.

Upon mature consideration of the concerns raised by Westvaco's Petition for Rehearing, we shall deny Westvaco's Petition.

In reviewing the terms of the Commission's October 31, 1984 Order, we have determined that our order should have directed Mountaineer to calculate over/underrecovery balances from July 1, 1980. Our order referred to November 1, 1981 as the date on which the Commission initially began determining ACA's according to rate schedules and concluded that calculations should reflect data from that date forward. Though the first tariffs utilizing ACA's determined on a rate schedule basis became effective November 1, 1981, the period in question over which this rate schedule methodology was first utilized was from July 1, 1980 through June 30, 1981. Since our intent was to fairly account for each IUS and LV customers' contribution to the outstanding underrecovery balance as of October 31, 1984, we find that this calculation should be done through July 31, 1980 so that these calculations would reflect the best available data.

Finally, upon review of Mountaineer's motion to extend the deadline by which it is to calculate the outstanding over/underrecovery balance as of October 31, 1984, we are of the opinion that the requested fifteen (15) day extension should be granted. Such calculations are to be performed, pursuant to contractual arrangements, by employees of Columbia Gas Distribution Companies (CGDC). Furthermore, the billing information needed to do the calculations is in the possession of CGDC. Mountaineer represents that it has been informed that CGDC requires an extension of the deadline until January 16, 1985 to perform the task. We shall then modify our order to provide that calculation of the pertinent over/underrecovery balances shall be done by January 16, 1985, and Mountaineer shall notify the respective customers of the outstanding balance by February 16, 1985.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. By order entered on October 31, 1984 in Case No. 83-348-G-30C, this Commission determined that Columbia Gas of West Virginia, Inc.'s method of recapturing over/underrecovery balances should be modified to provide for the tracing of over/underrecovery balances to individual customers within the IUS and LV rate schedules. Mountaineer Gas Company, formerly Columbia Gas of West Virginia, was directed to calculate the comprehensive over/underrecovery balance for each customer in the LV-1 LV-2, IUS-1 and IUS-2 rate schedules during the period between November 1, 1981 through October 31, 1984. Mountaineer was to pay any outstanding overrecovery balance or receive payment for any outstanding underrecovery balance within 12 months after notice of such balance is provided.

2. After review of Mountaineer's petition and the Staff's original recommendation to track over/underrecoveries to specific IUS and LV customers, this decision shall be clarified to provide that IUS and LV customers shall pay any outstanding underrecovery balance in twelve equal monthly installments after receiving notice of the balance. Moun-

taineer shall refund any outstanding overrecoveries in the same manner.

3. The obligation of LV and IUS customers who have outstanding underrecovery balances to repay these balances as set forth above is not dependent on Mountaineer receiving substantial supplier refunds. However, we do recognize that extensive supplier refunds flowing from a Federal Appeals Court decision in *Interstate Natural Gas Association of America v. FERC*, 716 F 2d 1 (D.C., 1983), *Cert.denied* 104 S.Ct. 1616, once passed on to Mountaineer, would represent an available source of funds which could be utilized to offset prior payment obligations.

4. Upon mature consideration of the concerns and allegations set forth by Westvaco's petition, we determine that additional hearings in the case for the purpose of examining the adopted ACA methodology which incorporates the tacing of over/underrecovery balances to individual LV and IUS customers are not warranted. Therefore, Westvaco's petition for additional hearings shall be dismissed.

5. Since July 1, 1980 represents the initial date through which an ACA by rate schedule methodology was utilized and we intended to fairly determine each IUS and LV customer's contribution to Mountaineer's underrecovery balance as of October 31, 1984, we determine that our October 31, 1984 order should have directed Mountaineer to calculate each IUS and LV customer's outstanding over/underrecovery balance from July 1, 1980 through October 31, 1984.

6. Upon consideration of Mountaineer's motion for an extension of time, we determine that we should modify our decision to provide that Mountaineer shall complete the comprehensive over/underrecovery calculations required by our decision by January 16, 1985, and shall notify appropriate customers of the outstanding balance by February 16, 1985.

ORDER

IT IS, THEREFORE, ORDERED that:

1. The Petition for further hearings in this case, as submitted by Westvaco Corporation on November 16, 1984, is hereby denied.

2. The Commission's October 31, 1984 decision in this case shall remain in full force and effect, except that the following paragraph shall be substituted for ordering paragraphs, 2, 3 and 4 of the October 31, 1984 Order, for purposes of clarification:

(2) On or before January 16, 1985, Mountaineer Gas Company shall calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1 and IUS-2 rate schedules during the period between July 1, 1980 through October 31, 1984. Mountaineer shall inform each IUS and LV customer of any outstanding overrecovery or underrecovery balance by February 16, 1985.

(3) An IUS or LV customer shall pay any outstanding underrecovery balance determined to exist as of October 31, 1984 in twelve (12) monthly installments, without accrual of any interest, after notice of the outstanding balance is provided by Mountaineer.

(4) Mountaineer Gas Company shall pay any outstanding overrecovery balance determined to exist for an IUS or LV customer as of October 31, 1984 in twelve (12) monthly installments, without accrual of interest, after notice of the outstanding balance is provided by Mountaineer.

3. The Executive Secretary of the Commission shall serve a copy of this Order upon all paties of record by United States First Class Mail.

A TRUE COPY
TESTE:

HOWARD M. CUNNINGHAM
Executive Secretary

RFW/ds

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, in the City of Charleston on the 10th day of July, 1985.

CASE NO. 83-348-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.

Application to change rates, effective November 1, 1983, according to Rule 30C, General Order No. 183.4, Purchase Gas Application.

CASE NO. 84-100-G-SC

COLUMBIA GAS OF WEST VIRGINIA, INC., a corporation.

Proceeding Upon the Commission's Own Motion.

COMMISSION ORDER APPROVING REPAYMENT OBLIGATIONS AFTER FURTHER COMMENT

On August 10, 1983, Columbia Gas of West Virginia, Inc. (Columbia) filed a Rule 30C Application for recovery of increased purchased gas costs. After certain modifications, the Company requested a purchased gas adjustment (PGA) which would permit Columbia to recover total projected expenses of $236,628,100 for the twelve month period beginning November 1, 1983, and a prior period underrecovery of $5,743,829 experienced during the twelve months ending June, 1983. Interim rates recovering these costs were approved by order entered November 14, 1983.

After extensive review of Columbia's purchasing practices and related issues, this Commission entered an October 31, 1984 order which finally approved the interim

rates and charges established by the Commission's November 14, 1983 Order for continued use through October 31, 2984. As a part of this Order, this Commission determined that the Company's method of recapturing over/underrecovery balances related to prior period purchased gas costs should be modified to provide for the assignment of a specific over/underrecovery balance to individual customers within the IUS and LV rate schedules.

The Commission's October 31, 1984 order was further clarified by a December 28, 1984 order on reconsideration. According to these orders, Mountaineer Gas Company, formerly Columbia Gas of West Virginia, Inc., was directed to calculate the comprehensive over/underrecovery balance for each customer in the LV-1, LV-2, IUS-1 and IUS-2 Rate Schedules during the period between July 1, 1980 through October 31, 1984. Mountaineer is to pay any outstanding overrecovery balance or receive payment for any outstanding underrecovery balance in 12 monthly installments after notice of such balance is provided. (December 18, 1984 Order, ordering paragraph No. 2).

On January 28, 1985, National Steel Corporation appealed the Commission's orders to the Supreme Court of Appeals of West Virginia. A similar petition was filed by Westvaco Corporation on January 24, 1985. The Supreme Court rejected these appeals without opinion on April 23, 1985.

On February 1, 1985, Mountaineer Gas Company filed calculations of outstanding underrecovery balances with the Commission which purportedly satisfied the Commission's directive. Upon review of these calculations, it was clear that the Company, without Commission approval, included underrecovery balances for the month of November, 1984 within its calculations. (See February 1, 1984 Filing, Exhibit B). Since the inclusion of the month of November, 1984 significantly altered the Commission decision, this filing was rejected on its face.

Since the complete data underlying the calculations was then available in Mountaineer's office, by order entered

on February 28, 1985, we directed Staff to review this data and develop the corrected over/underrecovery balances for each LV and IUS customer in accordance with the Commission decision. We further directed Staff to file such calculations and supporting data with the Executive Secretary of the Commission by March 20, 1985 and provided that any interested party may file comments with the Executive Secretary of the Commission regarding the accuracy of Staff's calculations and methodologies by April 4, 1985. Notification of the outstanding over/underrecovery balances for the respective LV and IUS customers and associated obligations to repay were suspended until further Commission order.

Staff submitted the final set of calculations on March 28, 1985. By order entered April 1, 1985, we extended the deadline for filing comments regarding the accuracy of Staff's calculations and methodologies to April 12, 1985.

Upon review of the methodologies and calculations presented by Staff, we concluded that the respective over/underrecovery balances had been properly determined by Staff in accordance with the Commission's decision in this case. Therefore, by order entered April 24, 1985, the Commission reinstated the respective repayment obligations. Under this order, an IUS-1, IUS-2, LV-1 or LV-2 customer was to pay any outstanding underrecovery balance determined to exist as of October 31, 1984, per Staff calculations, in twelve (12) equal monthly installments after notice of the outstanding balance is provided by Mountaineer, without accrual of interest. Similarly, Mountaineer was to pay any outstanding overrecovery balance determined to exist for an IUS-1, IUS-2, LV-1 or LV-2 customer as of October 31, 1984, per Staff calculations.

On May 3, 1985, Mountaineer Gas Company requested that the Commission's order be clarified or modified so as to allow Mountaineer Gas Company to account for B&O taxes which will accrue against the balances. Further, on May 17, 1985, National Steel Corporation filed a motion which requested that the Commission reopen the period

for receiving comments on Staff's over/underrecovery calculations and underlying methodologies. National Steel Corporation noted that it was not provided copies of the February 28, 1985, April 1, 1985 and April 24, 1985 orders.

On June 13, 1985, the Commission entered an order on further reconsideration which reopened the period for commenting on Staff's calculations and methodologies used in determining over/underrecovery balances for LV and IUS customers, which were performed in accordance with the Commission orders in these cases. The comment period was reopened through Monday, June 24, 1985, and the respective repayment obligations established by the Commission's April 24, 1985 order was suspended until further order.

The Commission's June 13, 1985 order also clarified the prior orders to recognize that applicable B&O taxes would be assessed upon the respective over/underrecovery balances and included in the net amounts to be paid under the terms of the order. Since B&O taxes are regularly assessed against over and underrecovery balances pursuant to Rule 30C of the Commission's *Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicles* and since these over/underrecovery balances are being recovered through a case-specific modification to the Commission's Rule 30-C mechanism, we determined that this clarification was reasonable and proper.

By Order entered on June 21, 1985, the period for submitting appropriate comments was extended through July 1, 1985.

Comments on the matter were submitted by Westvaco Corporation and National Steel Corporation on June 24, 1985 and July 1, 1985, respectively. National Steel Corporation's filing also included a Petition for Reopening and Rehearing.

DISCUSSION

Westvaco Corporation and National Steel Corporation resubmitted the allegation that the Commission's modified over/underrecovery methodology adopted in this case constitutes retroactive ratemaking by the Commission. The argument was presented through a claim that Staff's calculations, which were performed in accordance with the Commission's methodology, amounted to retroactive ratemaking.

This issue has been previously scrutinized by the Commission as well as by the Supreme Court of Appeals of West Virginia, and it has been determined that the methodology for recapturing over/underrecovery balances established by the Commission's October 31, 1984 order and subsequent orders does not constitute retroactive ratemaking. Therefore, we conclude that the Staff calculations, which were done in accordance with these orders, likewise do not amount to retroactive ratemaking.

Further, National Steel Corporation asked the Commission to reverse its adoption of a methodology which specifically assigns over/underrecovery balances on grounds which had been rejected by the Supreme Court. We continue to find that the methodology for recapturing over/underrecovery balances established by the Commission's October 31, 1984 order and subsequent orders is reasonable and proper and shall be applied in this case.

Finally, National Steel Corporation asserted that the Commission's decision will result in undue hardship to customers since extensive refunds which could have been offset against outstanding underrecovery balances shall not be forthcoming from Columbia Gas Transmission Corporation. In *Columbia Gas Transmission Corporation*, Docket Nos. TA82-1-21-001, *et al.*, the Federal Energy Regulatory Authority accepted a settlement agreement which would delay the disposition of any refunds to September, 1987. Therefore, National Steel Corporation asserted that the Commission's methodology for recapturing over/un-

derrecovery balances would result in an undue hardship on customers who had severely reduced gas consumption.

Even though it appears that additional supplier refunds may not be forthcoming from Columbia Gas Transmission Corporation due to its settlement of Docket TA82-1-21-001, *et al.*, we maintain that the absence of such refunds does not warrant a reversal of the Commission's decision to specifically assign over/underrecovery balances to LV and IUS customers. As noted in the Commission's December 18, 1984 order on Petition for Reconsideration, "it is clear that the payment obligation to Mountaineer related to outstanding underrecovery balances is in no manner dependent on the availability of pending supplier refunds", though we recognized that such supplier refunds could be available sources of funds which may be used to offset payment obligations. (December 28, 1984 Order, at p. 4).

Further, a true reading of the Commission's prior orders reveals that the hardship question arose with respect to the repayment schedule of twelve months established by the Commission's October 31, 1984 order and did not address the actual implementation of a specific assignment of over/underrecovery balances to LV and IUS customers. We continue to hold that the specific assignment of such balances is fair and equitable and should be adopted in this case. We also find that a repayment schedule of twelve months does not create an undue hardship in this case, particularly since the repayment obligations have been suspended during the various stages of review.

Therefore, after reviewing the matters presented by the various comments, we conclude that the respective over/underrecovery balances have been properly determined by Staff in accordance with the Commission's orders in these cases. Therefore, we shall deny National Steel Corporation's petition for reconsideration and we shall approve the respective repayment obligations as determined by Staff, summarized in Appendices A and B.

FINDINGS OF FACT

1. On June 13, 1985, the Commission entered an order which reopened the period for commenting on Staff's calculations and methodologies used to specifically determine over/underrecovery balances for LV and IUS customers which were performed in accordance with the Commission orders in these cases.

2. Comments on the matter were submitted by Westvaco Corporation and National Steel Corporation on June 24, 1985 and July 1, 1985, respectively. National Steel Corporation's filing also included a Petition for Reopening and Rehearing on the Commission methodology.

3. The assertions of Westvaco Corporation and National Steel Corporation that the specific assignment of over/underrecovery balances amounts to retroactive ratemaking has been fully considered by this Commission, and an appeal of that issue has been denied by the Supreme Court of Appeals of West Virginia.

CONCLUSIONS OF LAW

1. After reviewing the matters presented by the various comments, we conclude that the respective over/underrecovery balances have been properly determined by Staff in accordance with the Commission's orders in these cases.

2. Upon review of the respective filings, we determine that National Steel Corporation's Petition for Reconsideration should be denied, and we shall approve the respective repayment obligations as determined by Staff, summarized in Appendices A and B.

ORDER

IT IS, THEREFORE, ORDERED that:

1. The Petition for Reopening and Rehearing submitted by National Steel Corporation on July 1, 1985, is hereby denied.

2. Mountaineer Gas Company shall notify each IUS-1, IUS-2, LV-1 and LV-2 customer of its outstanding overrecovery or underrecovery balance determined to exist as of October 31, 1984, per Staff calculations summarized in Appendices A and B, by August 1, 1985.

3. An IUS-1, IUS-2, LV-1 or LV-2 customer shall pay any outstanding underrecovery balance determined to exist as of October 31, 1984, per Staff calculations, plus applicable B&O taxes, in twelve (12) equal monthly installments after notice of the outstanding balance is provided by Mountaineer Gas Company, without accrual of any interest.

4. Mountaineer Gas Company shall pay any outstanding overrecovery balance determined to exist for an IUS-1, IUS-2, LV-1 or LV-2 customer as of October 31, 1984, per Staff calculations, plus applicable B&O taxes, in twelve (12) equal monthly installments after notice of the outstanding balance is provided by Mountaineer, without accrual of interest.

5. The Executive Secretary of the Commission shall serve a copy of this order upon all parties of record by United States First Class Mail, and upon all IUS and LV customers listed in Appendices A and B by United States Registered Mail, return receipt requested.

A TRUE COPY
TESTE:

HOWARD M. CUNNINGHAM,
Executive Secretary

APPENDIX A

MOUNTAINEER GAS COMPANY LV1 and LV2 CUSTOMERS
CUSTOMER CHARGES AND RELATED B & O TAXES FOR UNRECOVERED GAS COSTS

Customer Name	Before Tax	Tax Increment	After Tax
Air Prod & Chem Inc	$ 19,075	$ 855	$ 19,930
Airco Welding Products	-1,481	-66	-1,547
Celotex Division	33,182	1,487	34,669
Connors Steel Company	19,613	879	20,492
Continental Can Company	-22,064	-989	-23,053
Crescent Brick Company	8,098	363	8,461
Crescent Glass Co Inc	25,175	1,128	26,303
Diamond Shamrock Corp	92,569	4,149	96,718
E I DuPont de Nemours C LV1 & LV2	331,018	14,837	345,855
Flex-O-Lite Mfg Corp	-7,352	-330	-7,682
Fostoria Glass Co	71,417	3,201	74,618
General Cigar	10,087	452	10,539
Globe Refractories Inc	47,689	2,138	49,827
Goodyear Tire And	171,358	7,681	179,039
Griffin Industries Inc	12,029	540	12,569
Homer Laughlin China Co	67,875	3,042	70,917
Huntington Alloys Inc	7,096	318	7,414
Industrial Chemical Div	5,909	265	6,174
Kaiser LV1 and LV2	-48,765	-2,186	-50,951
Keyser Glass Con Co Inc	120,797	5,415	126,212
Kingsford Company	-16,533	-741	-17,274
Kingwood Mining Co	6,411	287	6,698
Koppers Company Inc	118,326	5,304	123,630
Means Services Inc	3,097	139	3,236

MOUNTAINEER GAS COMPANY LV1 and LV2 CUSTOMERS
CUSTOMER CHARGES AND RELATED B & O TAXES FOR UNRECOVERED GAS COSTS

Customer Name	Before Tax	Tax Increment	After Tax
Monsanto Chemical Co	$26,192	$ 1,174	$27,366
New Castle Refractories	6,181	277	6,458
Novamont Corporation	69,289	3,106	72,395
Ohio Brass Company	27,121	1,216	28,337
Pantasote Company	19,690	883	20,573
Pennzoil Company	5,099	229	5,328
Quaker St Oil Refining	69,653	3,122	72,775
Rep Steel Corp Cont Div	-9,180	-411	-9,591
Scandia Glass Works Inc	5,981	268	6,249
Signode Corporation	22,315	1,000	23,315
Specialty Chemical Div	19,163	859	20,022
Stauffer Chemical Co	-11,504	-516	-12,020
Taylor Smith and Taylor	46,899	2,102	49,001
The Pilgrim Glass Corp	18,348	822	19,170
Triangle Conduit &	9,877	443	10,320
USS Chemicals Inc	-26,353	-1,181	27,534
Veterans Adm Hospital	-5,905	-265	-6,170
Viking Glass Co 65470 3229	23,119	1,036	24,155
Viking Glass Company 19000 3229	4,259	191	4,450
W Va Malleable Iron Inc	2,614	117	2,731
Weirton Steel LV2	780,637	34,990	815,627
Westvaco Corp	401,205	17,983	419,188
Wheeling Stamping Co	2,303	103	2,406
WHG Pittsburgh Steel	117,408	5,263	122,671
WV State Penitentiary	-5,113	-229	-5,342

APPENDIX B

MOUNTAINEER GAS COMPANY IU1 AND IU2 CUSTOMERS
COMPARISON OF CUSTOMER CHARGES AND RELATED B & O TAXES FOR UNRECOVERED GAS COSTS

Customer Name	Before Tax	Tax Increment	After Tax
Cabot Gas Corp	$ 1,520	$ 4	$ 1,524
Consumers Gas Utility	17,720	48	178,768
Edwards Natural	180	1	181
Harper Heights Gas Co	24,910	68	24,978
Holden Gas Company	45,831	124	45,955
Lake Washington	6,178	17	6,195
Logan Gas Company	23,811	65	23,876
Ona Rural Gas 96900	918	2	920
Southern Public Service	87,549	237	87,786
The Wayne Gas Company	-25,653	-70	-25,723
Union Oil & Gas	62,491	169	62,660
Valley Gas Co	7,701	21	7,722

APPENDIX C

Notice of Appeal

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NATIONAL STEEL CORPORATION, PETITIONER,
v.
THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, RESPONDENT.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Steel Corporation, the Petitioner above named, hereby petitions the Supreme Court of the United States for a writ of certiorari from the final judgment of the Supreme Court of Appeals of West Virginia, entered in this action on November 6, 1985, denying the petition of National Steel Corporation for an appeal from, suspension and review of, the final order dated July 10, 1985, of the Public Service Commission of West Virginia in PSC Case Nos. 83-348-G-30C and 84-100-G-SC, which denial by the Court constituted an affirmance of said order of the Public Service Commission.

This petition is taken pursuant to 28 U.S.C. §1257(3).

T.D. Kauffelt
Counsel for Petitioner,
National Steel Corporation.

[Certificate of Service Omitted]

APPENDIX D

West Virginia Code of 1931, as Amended, Chapter 24, Article 2, Section 3, and Chapter 24, Article 5, Section 1

§ 24-2-3.General power of commission with respect to rates.

The commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities: Provided, that the commission may exercise such rate authority over municipal utilities only under the circumstances set forth in section four-b [§ 24-2-4b] of this article. And whenever the commission shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by an order fix reasonable rates, joint rates, tariffs, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provisions of law, and the said commission, in fixing the rate of any railroad company, may fix a fair, reasonable and just rate to be charged on any branch line thereof, independent of the rate charged on the main line of such railroad.

In determining just and reasonable rates, the commission may audit and investigate management practices and policies, or have performed an audit and investigation of such practices and policies, in order to determine whether the utility is operating with efficiency and is utilizing sound management practices. The commission shall adopt rules and regulations setting forth the scope, frequency and application of such audits and investigations to the various utilities subject to its jurisdiction. The commission may include the cost of conducting the management audit in the cost of service of the utility.

In determining just and reasonable rates, the commission shall investigate and review transactions between utilities and affiliates. The commission shall limit the total return of the utility to a level which, when considered with the level of profit or return the affiliate earns on transactions with the utility, is just and reasonable. (1915, c. 8, § 22; Code 1923,c. 15-O, § 22; 1979, c. 98; 1983, c. 186.)

§ 24-5-1. Review of final orders of commission.

Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order. The applicant shall deliver a copy of such petition to the secretary of the commission on or before the date the same is presented to the court or the judge, and it shall be the duty of the secretary promptly to file with the clerk of said court all papers, documents, evidence and other records constituting the complete record in the case, or certified copies thereof, as were before the commission at the time of the entry of the order from which the appeal is taken. The court or judge shall fix a time for the hearing on the application, but such hearing, unless by agreement of the parties, shall not be held sooner than five days after its presentation; and notice of the time and place of such hearing shall be forthwith delivered to the secretary of the commission, so that the commission may be represented at such hearing by one or more of its members or by counsel. If the court or the judge after such hearing be of the opinion that a suspending order should issue, the court or the judge may require bond, upon such conditions and in such penalty, and impose such terms and conditions upon the petitioner, as are just and reasonable. The commission shall file with the court before the day fixed for the final hearing a written statement of its reasons for the entry of such order, and after arguments by counsel the court shall decide the matter in

controversy as may seem to be just and right. (1913, c.9, § 16; Code 1923, c.15-O, § 16; 1979, c.98.)

APPENDIX E

Orders of the Public Service Commission, General Orders Nos. 183.2 and 183.4, and Order from Case No. 83-348-G-30C, dated October 13, 1983

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 23rd day of February, 1979. GENERAL ORDER NO. 183.2

In the matter of Rule 30-C

Purchased Gas Adjustment.

WHEREAS, Rule 30-C of the Commission's Rules and Regulations For The Government of The Construction And Filing Of Tariffs Of Public Utilities Other Than Common Carriers, as authorized by General Order 183.1 on the 30th day of August, 1977, provides in part: "Nothing herein shall preclude or abrogate the authority of the Public Service Commission of West Virginia to make any interpretations hereof deemed necessary and require action accordingly based on such interpretations or special situations."; and

WHEREAS, enactment of the Natural Gas Policy Act of 1978 (hereinafter NGPA) by the Congress of the United States, and the promulgation of subsequent related regulations and orders by the Federal Energy Regulatory Commission have brought about a special situation whereby Purchased Gas Adjustment (PGA) Tariffs have been and are being filed by West Virginia gas utilities which tariffs include costs apparently attributable to the effect of the NGPA but without sufficient information to permit thorough Commission evaluation; and

WHEREAS, it is the duty of this Commission to protect the customers of jurisdictional utilities from unreasonable and unlawful costs, and it appears that differing interpretations of the NGPA and said related regulations and orders exist; and

WHEREAS, the Commission deems it in the public interest to defer approval of PGA price changes that may be affected by the NGPA pending interpretation of the law, clarification of regulations and certainty as to the correct application of the NGPA to PGA filings; and

WHEREAS, thirty-one monthly PGA tariffs are being filed by twenty-four gas utilities who have elected to use the provisions of Rule 30-C, which twenty-four utilities are listed on Appendix A attached hereto and are hereby made parties hereto as if fully named herein; and

WHEREAS, the Commission is concerned about the significant percentage of unaccounted for gas which is being recorded in the present calculation of PGA filings.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, THE COMMISSION FINDS AND ORDERS that no gas utility shall, except as hereinafter provided, apply a Purchased Gas Adjustment that includes any effect of the NGPA, whether estimated or believed to be actual, until further order of the Commission.

THE COMMISSION FURTHER FINDS AND ORDERS that the estimated monthly cost of purchased gas (as defined in Rule 30-C) for calculating Purchased Gas Adjustments shall be at prices not greater than those utilized in calculating Purchased Gas Adjustments for November 1978, or at prices that would have been used in such calculation had the supply then existed; *provided, however,* that gas purchased under effective Federal Energy Regulatory Commission or Public Service Commission of West Virginia Gas Tariff Rate Sheets may be priced at the rates or prices set forth thereon. Any other cost increment in excess of November 1978 levels, believed to be attributable to the effect of the NGPA on contract or area prices, shall not be included in the computation of Purchased Gas Ad-

justments until authorized by the Public Service Commission of West Virginia. The Commission will consider applications for increases over November 1978 price levels; however such applications must fully justify the requested increases.

IT IS FURTHER ORDERED that any gas utility which, prior to the date of this order, has applied a previously calculated monthly Purchased Gas Adjustment to any bill issued shall apply the same Purchased Gas Adjustment uniformly to all bills issued for that same application month so that all customers will be treated equally.

IT IS FURTHER ORDERED that gas utilities purchasing gas from Hope Natural Gas Company, a Division of Consolidated Gas Supply Corporation, shall use the following tariff rates for calculating purchased gas cost estimates for February 1979 and thereafter until further notice:

Minimum bill	$25.00	each meter.
First	1 Mcf	$ 4.07
Next	5 Mcf	$ 1.195
Next	94 Mcf	$ 1.067
Next	5,900	$ .986
Next	44,000 Mcf	$ .927
Over	50,000 Mcf	$ .858

The above rates are subject to Purchased Gas Adjustments.

IT IS FURTHER ORDERED that gas utilities using Rule 30-C which receive refunds from Hope Natural Gas Company based on rates which were made effective under bond as of October 1, 1978 in Case No. 9309 shall, to the extent such rates were embedded in their respective Purchased Gas Adjustments, determine the related quantity of gas billed each customer during the respective months and distribute the related refund, including the interest plus the West Virginia B & O Tax effect, to each such customer pro rata by dollar amounts by check except, where refunds are for less than $5.00 said refund may be made as a credit on bills within sixty (60) days of the date

of this order, except that any such refunds may be applied to past due accounts. Such refunds to consumers will be made whether Hope's refund is made in cash or as a credit to past due accounts.

IT IS FURTHER ORDERED, that a hearing be held in the Commission's Hearing Room in the City of Charleston at 9:30 a.m. on the 16th day of April, 1979, at which time the Commission shall conduct a review of Rule 30-C generally with consideration to be given specifically to the possibility of limiting recovery for unaccounted for gas; at which time all interested parties may present evidence and be heard on these issues.

IT IS FURTHER ORDERED that each natural gas utility which uses Rule 30-C shall publish a copy of this order in a newspaper published and of general circulation in each county in which the utility operates at least twice, the first publication to be made not earlier than thirty (30) days before the date of hearing and the second publication not later than fifteen (15) days before the date of hearing.

The Executive Secretary of the Commission shall send a copy of this order by certified mail to each of the utilities named in Appendix A, return receipt requested.

A copy.

TESTE:

HOWARD M. CUNNINGHAM

Executive Secretary

APPENDIX A

GENERAL ORDER 183.2
FEBRUARY, 1979

Ashford Gas Company
Blacksville Oil & Gas Company
Bluefield Gas Company
Cabot Corporation
Cameron Gas Company
Carnegie Natural Gas Company
Columbia Gas of West Virginia, Inc.
Consumers Gas Utility Company
Equitable Gas Company
Fifty Two Gas Company
Harper Heights Gas Company
Hope Natural Gas Company, a division of
Consolidated Gas Supply Corporation
Interstate Utilities Company
Lake Washington Gas, Inc.
Lumberport Shinnston Gas Company
Oceana Gas Company
Town Gas Company
Ravencliff Fuel & Supply Company
Shenandoah Gas Company
Southern Public Service Company
Standard Gas Company
Union Oil & Gas, Inc.
Valley Gas Company
The Wayne Gas Company

GENERAL ORDER NO. 183.4

In the matter of Rule 30-C

Purchased Gas Adjustment.

ORDER: ENTERED June 26,1979.

APPEARANCES: Augustine A. Mazzei, Jr., for Equitable Gas Company; Demetrios G. Pulas, Jr., for Shenandoah Gas Company; Thomas N. Hanna for Consumers Gas Utility, Fifty-Two Gas Company; Cameron Gas Company, HAB Limited, Union Oil and Gas Company, and West Virginia Small Public Utilities Association; Richard Hitt for Council of' Senior West Virginians, Concerned Citizens of Montgomery, Citizens Concerned About High Gas Bills, and an unnamed association of persons residing in Cabell and Wayne Counties; Robert S. Baker for Concerned Citizens of Montgomery; James D. Kauffelt for Oceana Gas Company and Town Gas Company; Charles McElwee and Andrew Sonderman for Columbia Gas of West Virginia, Inc.; Milford L. Gibson for Blacksville Oil and Gas Company and Lumberport-Shinnston Gas Company; John C. Lobert for Southern Public Service Company; F. Paul Chambers and William C. Charlton for Cabot Corporation; C.E. Goodwin for Pennzoil Company; Willis O. Shay and Ralph J. Bean, Jr., for Hope Natural Gas Company; Jeremiah B. Lambert for Independent Oil and Gas Association of West Virginia; Rodney Jackson for WOWK, Channel 13; Carlton L. Smith for Bluefield Gas Company; and Robert Rodecker and Ann Dornblazer for Staff.

PROCEDURE

On February 23, 1979 the Commission issued an order in this case for the purpose of instituting a general review of the current procedures for permitting gas utilities to recover purchased gas costs through the purchased gas

adjustment (PGA) under Rule 30-C of the Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle.

The Commission ordered a general review of Rule 30-C for two reasons. First, the Commission has received many complaints about the PGA in general. Second, consumer complaints and Commission investigations indicated that utilities were inappropriately benefiting from the allowance in the PGA for unaccounted for gas. The Commission's order in this case on February 23, 1979, ordered notice to be given and a hearing to be held for the purpose of generally reviewing Rule 30-C and specifically considering the problem of unaccounted for gas. The order further required each gas company using Rule 30-C to provide notice of a hearing to be held on April 16, 1979. Notice was given and hearings were held on April 16, and 17, 1979. After the hearing on April 17 the case was submitted.

EVIDENCE

On the first day of the hearing, several hundred consumers attended. The Commission granted all in attendance a full opportunity to appear as protestants. Many protestants did appear to present consumer dissatisfaction with the current PGA and excessive line loss. The staff offered one witness, and a number of witnesses appeared for one or more gas companies.

ISSUES

The issues raised at the hearing involved two aspects of the purchased gas allowance provided under Rule 30-C.

1. Should the current monthly adjustment be levelized over a longer period such as a year?

2. Should the adjustment in the PGA for unaccounted for gas be limited to a specific percentage of loss?

DISCUSSION

1. PGA Period

In its testimony staff recommended a proposed Rule 30-C to replace the existing rule. The proposed rule would provide for an annual adjustment in the PGA rather than the monthly adjustment in the current rule. Over or under recovery of purchased gas costs would be accumulated for the year ending August 31.

Company witnesses generally agreed that the amended Rule 30-C should abandon the use of monthly adjustments, although Union Oil & Gas, Lumberport-Shinnston Gas Company and Blacksville Oil and Gas Company favored the retention of the monthly system. The other companies favored a levelized PGA computed annually or semiannually. Hope Natural Gas Company argued that an annual PGA would cause more cash flow problems than a semiannual adjustment. A semiannual PGA would fit that company's seasonal purchase patterns. Consumer intervenors favored an annual adjustment.

The Commission believes that while smaller gas utilities could experience cash flow problems if required to adhere to an annual change in rates to recover purchased gas costs, larger companies should be able to adjust to any cash flow problems caused by such a purchased gas recovery procedure. Therefore, the Commission will amend Rule 30-C to provide for a levelized application with an annual review, but will provide an option for smaller gas utilities (those having annual intrastate sales of 2,000,000 Mcf or less) to use a semiannual levelized purchase gas procedure. The semiannual periods specified (November 1 through April 30 and May 1 through October 31) correspond to the seasons of high and low gas consumption. Consequently, the semiannual procedure should permit smaller gas utilities to continue to recover purchased gas costs on a reasonably current basis.

2. Unaccounted for Gas

Under the current purchased gas adjustment in Rule 30-C, gas utilities are permitted to recover from consumers the total cost of unaccounted for purchased gas. Evidence presented by the staff indicates that in same cases unaccounted for gas represents 20-30% of all gas purchased by a company. Graphic testimony by a number of consumer protestants suggests that a significant cause of this unaccounted for gas is loss of gas through leaking pipelines and other defective equipment. Some minimal amount of unaccounted for gas is inevitable even in the most soundly constructed system. However, the high rates of unaccounted for gas experienced by some gas utilities involved in this proceeding are intolerable.

Under current circumstances gas utilities have no incentive to reduce the amount of their unaccounted for gas through better accounting and improvements in their lines. The unlimited adjustment under the Commission's Rule 30-C for unaccounted for gas permits utilities to pass the total cost of such gas on to consumers. This situation is objectionable for two reasons. First, gas is being wasted through line loss. Second, consumers are paying for gas that they do not use.

In order to remedy the problem of excess unaccounted for gas, the new Rule 30-C will permit an adjustment in purchased gas costs only for reasonable amounts of unaccounted for gas. To the extent that gas utilities experience unaccounted for gas in excess of the standards of reasonableness established in the rule, they will be required to absorb the cost thereof and thus will be given an incentive to improve their operation and maintenance. Gas utilities, not their customers, must suffer the consequences of failing to reduce unaccounted for gas to reasonable levels.

The Commission recognizes that large and small utilities do not have equal ability to make the improvements needed to reduce unaccounted for gas to a reasonable level. For this reason the standard of reasonable unaccounted for gas

will depend upon whether a utility is large or small. Utilities or ratemaking divisions of utilities with more than 2,000,000 Mcf in annual intrastate sales may recover a maximum of 8% of purchased gas as unaccounted for gas occurring after November 1, 1979. However, if the actual unaccounted for gas occurring after November 1, 1979 during a year ending June 30 is less than 8%, that actual rate will be the amount recoverable as unaccounted for gas.

All other gas utilities or ratemaking divisions of utilities will be limited to recovery of unaccounted for gas occurring after November 1, 1979, according to the following schedule:

For rates taking effect 11/1/79—18%;
For rates taking effect 11/1/80—14%;
For rates taking effect 11/1/81 and each year thereafter—10%.

These percentages represent the maximum allowable recovery for unaccounted for gas. As in the case of large companies, if the actual unaccounted for gas for the preceding year ending June 30, is lower than said limit, that actual percentage would be the limit for unaccounted for gas recovery.

The Commission has considered the possible impact of the National Gas Policy Act of 1978 (hereinafter NGPA) upon gas utilities and believes that there is no reason to depart from its present policy (unless there is further clarification as to the correct application of the NGPA) that any flow-through of NGPA-related costs will be disallowed unless each utility petitions the Commission and, on a case by case basis, offers proof of its NGPA-related costs and that it is in compliance with the NGPA.

FINDINGS OF FACT

1. Current rates for the recovery of purchased gas costs are computed monthly under Rule 30-C.

2. Anticipated rising gas costs in the future suggest that stabilization of purchased gas costs on a monthly basis is unlikely.

3. Many small gas utilities currently experience high rates of unaccounted for gas. (Staff Ex. 1, p. 10)

4. A significant cause of unaccounted for gas is excessive line loss (See protestants testimony generally).

CONCLUSIONS OF LAW

1. The current method of permitting recovery of purchased gas costs is inadequate because it causes monthly fluctuations in gas rates and because it permits recovery for excessive amounts of unaccounted for gas.

2. To prevent consumers from paying for gas which they do not consume and to prevent waste of gas, the amount of unaccounted for gas must reduced to reasonable levels.

3. Existing Rule 30-C of the Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle should be repealed and replaced with a new rule of the same number, as set forth below.

4. The new rule represents a reasonable accommodation of the interests presented to the Commission by the parties and protestants in this case.

ORDER

1. Existing Rule 30-C of the Commission's Rules and Regulations is hereby repealed, but the PGA for June-October, 1979, shall be computed according to the provisions of that rule.

2. The following Rule 30-C of the Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle shall be a procedure by which gas companies may obtain interim rate adjustments to reflect changes in purchased gas costs:

RULE 30-C
PURCHASED GAS COST

This rule sets forth a procedure for changing the rates per Mcf charged to customers by natural gas distribution utilities based exclusively on the cost of purchased gas including gas purchased by a utility and related transportation for delivery to its customers adjusted for net current gas stored, net exchange gas, shrinkage due to processing, excessive unaccounted for gas and over or under cost recoveries. The Public Service Commission of West Virginia may interpret this rule if necessary and may require appropriate action based upon any such interpretation. The Commission reserves the authority under its general power to review any information filed under this rule and to order appropriate changes based on applications before the Commission. If any provision of this rule would result in undue hardship for a utility or its customers, the Commission may modify the application of this rule appropriately.

(A) APPLICATION

Any change under this rule in the rates charged by a gas utility shall apply for a twelve-month period from November 1 through October 31. Each gas utility that requests an adjustment in its rates to reflect purchased gas costs shall submit an application on or before August 1. The application shall include proposed rates that reflect estimated purchased gas costs for the annual period beginning on November 1. The application shall also include a statement of actual purchased gas costs, cost over and under recovery and refund data for the twelve months ending June 30, and such other supporting information as the Commission may require. The utility shall state separately the quantity and cost of each source of gas.

A gas utility that submits application under division (A) of this rule shall continue to submit an application in each subsequent year until the Commission orders otherwise.

Each ratemaking division of a utility shall submit a separate application under this rule.

(B) OPTIONAL SEMIANNUAL APPLICATION

A gas utility or ratemaking division of a utility with annual intrastate sales of not more than 2,000,000 Mcf for the year ending June 30 may elect to apply for semiannual adjustments in its rates under this rule. A utility electing to file a semiannual application shall file an application as required under division (A) of this rule with the statement that it will use the semiannual option.

Any change under this rule in the rates charged by a gas utility using the semiannual option shall apply for the period from November 1 through April 30 and May 1 through October 31. On or before February 1 the utility shall file a supplementary application, including a statement of actual purchased gas costs, cost over and under recovery, and refund data for the six-month period ending December 31 and proposed adjustments to its rates to reflect estimated purchased gas costs for the period May 1 through October 31.

The option to file a semiannual application shall be exercised each year at the time for filing the annual application required under division (A).

(C) COMMISSION REVIEW

The Commission shall review applications submitted under this rule, specify an appropriate method for providing notice, and provide an opportunity for interested parties to submit evidence or objections concerning an application submitted under this rule.

(1) ESTIMATED PURCHASED GAS COSTS

The Commission shall determine for the annual or semiannual period for which a rate change is computed under this rule:

(a) The estimated amount of purchased gas costs (Volume of purchased gas times average cost of purchased gas);

(b) The estimated volume of purchased gas;

(c) The estimated volume of sales;

(d) The estimated total gas supply available (Total gas supply includes all purchased gas whether natural, synthetic, liquified, natural, propane or other manufactured gas, net storage, net exchange or net borrowed gas, and gas produced by the utility).

(2) DEFINITIONS

(a) "Unaccounted for gas" means the difference between total gas supply, net of measured company use and measured free gas and total gas sales.

(b) "Percentage of allowable unaccounted for gas" means for each utility or each ratemaking division of a utility the ratio of unaccounted for gas to total gas supply not in excess of the lesser of:

(i) actual percentage of unaccounted for gas for the twelve month period ending June 30; or

(ii) 8% for utilities or ratemaking divisions of utilities with more than 2,000,000 McF annual sales, and for all other utilities:

For rates taking effect on	
11/1/79	18%
11/1/80	14%
11/1/81 and each year thereafter	10%

(3) REDUCTION FOR ESTIMATED EXCESS UNACCOUNTED FOR GAS

The Commission shall reduce the amount of purchased gas costs by the cost of excess unaccounted for gas. The cost of excess unaccounted for gas shall be computed as follows:

(a) Subtract the estimated volume of sales from estimated total supply available, net of measured company use and free gas, to obtain the total volume of estimated unaccounted for gas;

(b) Divide the estimated volume of unaccounted for gas by the total supply available, net of measured company use and free gas, to obtain the percentage of unaccounted for gas;

(c) Subtract the allowable percentage of unaccounted for gas from the estimated percentage of unaccounted for gas obtained in (C)(3)(b) to obtain the percentage of excess unaccounted for gas (If the estimated percentage of unaccounted for gas in equal to or less than the percentage of allowable unaccounted for gas, no adjustment in the amount of purchased gas costs is made under this division);

(d) Multiply the percentage of excess unaccounted for gas obtained in (C)(3)(c) by the amount of purchased gas costs in (C)(1)(a) to obtain the amount of excess unaccounted for gas costs by which such purchased gas costs must be reduced.

The difference between purchased gas costs and the amount of excess unaccounted for gas costs equals the amount of allowable purchased gas costs.

(D) OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

The amount of allowable purchased gas costs determined in division (C) shall be increased or decreased by the amount of over or under recovery of purchased gas costs in the preceding period. Over or under recovery of purchased gas costs shall be computed as follows:

(1) ACTUAL GAS COST

Within 60 days after the end of each calendar month, each gas utility whose rates are adjusted under this rule shall report the following information for that month:

(a) Actual quantity and cost of purchased gas received from suppliers;

(b) Actual quantity and cost of all gas transferred to storage;

(c) Actual quantity and cost of all gas withdrawn from storage;

(d) Actual net settlement cost of exchange gas;

(e) Actual cost of gas shrinkage (product of shrinkage volume multiplied by average unit cost of purchased gas processed);

(f) Total gas sold in Mcf.

Add or subtract the cost amounts stated in (a) through (e) to obtain the net cost of gas. Divide the net cost of gas for the month by the total Mcf sold during that month to obtain the actual cost of gas per billing unit (Mcf).

(2) GROSS OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

Within 60 days after the end of each calendar month, each gas utility whose rates are adjusted under this rule shall report its over or under recovery of purchased gas costs to the Commission. Over or under recovery of purchased gas costs shall be computed as follows:

(a) Subtract the actual cost of gas per billing unit, as determined under (D)(1) of this rule, during the month from the estimated cost per Mcf embedded in the rates authorized to be charged during that month under this rule;

(b) Multiply the difference obtained in (a) by the total sales in Mcf to which the rates authorized under this rule were applied in that month.

(c) The over or under recovery amounts so obtained for each month shall be accumulated for the twelve months ending June 30 or the six months ending June

30 and December 31 as appropriate to obtain an annual or semiannual total over or under recovery of purchased gas cost.

(3) NET OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

The cumulative over or under recovery obtained in (D)(2)(c) shall be reduced by an amount computed as follows:

(a) Divide the actual cost of purchased gas during the period by the total Mcf purchased during that period to obtain the average cost per Mcf of purchased gas;

(b) Multiply the average cost obtained in (a) by the total Mcf of unaccounted for gas in excess of the allowable percentage of unaccounted for gas for the period to obtain the total cost of excess unaccounted for gas;

(c) Divide the volume of purchased gas by the total gas supply volume to obtain the percentage of purchased gas to total supply for the period.

(d) Multiply the amount obtained in (b) by the percentage obtained in (c) to obtain the cost of excess unaccounted for gas attributable to purchased gas.

(e) Subtract the amount obtained in (d) from the gross over or under recovery for the period obtained in (D)(2)(c) to obtain the net amount of cost over or under recovery in the preceding period to be recovered in the current period.

(E) PURCHASED GAS RATE

The Commission shall divide the estimated cost of purchased gas as adjusted for excess unaccounted for gas and over or under recovery of costs as provided in divisions (C) and (D), by the estimated total sales (Mcf) for the annual or semiannual period for which a rate change is

computed. The quotient so obtained shall be multiplied by (1 ÷ (1–Tax)), where "Tax" equals the West Virginia B&O Tax rate effective on November 1 of the current period. The product so obtained shall equal the rate per Mcf to be rolled into the base rates of the utility for the current period.

Purchased gas charges shall not be included in service charges or rates for zero usage.

(F) REFUNDS

When any utility which has received an increase in its rates under this rule receives a refund of the charges of a supplier whose charges were the basis for the increased rates under this rule, the utility shall provide a credit on each customer's bill within 120 days after receipt of the refund. The credit shall return to the utility's customers the full amount of the supplier's refund including any interest received. The amount of credit for each customer shall be based upon that customer's consumption during the period for which the refund was awarded. Utilities shall report monthly by docket numbers the refunds received, refunds made, and current balances.

3. In 1979, the determination of over or under recovery of purchased gas costs shall be computed for the period August 31, 1978 through June 30, 1979. In computing the net over or under recovery of purchased gas costs, no reduction in over or under recovery shall be made under (D)(3) of this rule for excess unaccounted for gas costs occurring before October 31, 1979.

4. The Secretary of the Commission shall mail copies of this order to each gas utility regulated by this Commission, to all parties of record in this proceeding and to the State Attorney General, and shall file two certified copies thereof with the Secretary of State pursuant to W.Va. Code 29A-1-2.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 13th day of October, 1983. CASE NO. 83-348-G-30C

COLUMBIA GAS OF WEST VIRGINIA, INC.,
a corporation.

Application to change rates, effective November 1, 1983, according to Rule 30C, General Order No. 183.4, Purchased Gas Application.

COMMISSION ORDER ESTABLISHING A PROCEDURAL SCHEDULE

On August 10, 1983, Columbia Gas of West Virginia, Inc., a corporation, (Columbia Gas) filed its Rule 30C application for purchased gas costs proposing an increase in the purchased gas increment from the interim rate of $4.948 per Mcf to $5.484 per Mcf.

On September 6, 1983, the Consumer Advocate Division (CAD) filed a motion "to suspend rates or in the alternative to limit the October hearing and delay hearing on substantive issues for several months" in the above styled case.

On September 19 and 23, 1983, respectively, Columbia Gas and Staff filed their responses to the Consumer Advocate's motion.

By order entered on September 21, 1983, the Commission set an informal conference to be held on October 5, 1983, for the purpose of establishing the identity of the parties, the issues to be addressed, and the procedural schedule to be followed. The informal conference was held

as scheduled with parties of interest being identified and with issues to be addressed left for mature consideration.

The Commission is of the opinion that the following procedural schedule should be, and hereby is, ordered to be followed in this proceeding:

1. All parties of interest shall file simultaneous direct testimony on the issue of the establishment of interim rates in this case on or before October 14, 1983, at 5:00 p.m. EDST.

2. All parties of interest shall file simultaneous rebuttal testimony on the issue of interim rates in this case on or before October 21, 1983, at 5:00 p.m., EDST.

3. This matters concerning the establishing of interim rates and the argument on pending motions, together with public testimony, is hereby set for hearing on October 24, 1983 in the Commission Hearing Room at the Capitol in the City of Charleston, at 9:30 a.m., EDST.

4. On or before November 16, 1983, at 5:00 p.m., EST, Columbia Gas shall file its direct testimony in the case in chief.

5. All data requests shall be submitted on or before December 6, 1983, at 5:00 p.m., EST.

6. All other direct testimony shall be filed in the case in chief on or before December 23, 1983, at 5:00 p.m. EST.

7. On or before January 6, 1984, at 5:00 p.m., EST, Columbia Gas shall file its rebuttal testimony.

8. This case is set for hearing to be held on January 9, 1984, in the Commission Hearing Room at the Capitol in the City of Charleston, at 9:30 a.m., EST.

IT IS FURTHER ORDER that Columbia Gas of West Virginia, Inc. shall give notice to its customers of the requested purchased gas increments of $5.484 per Mcf and of the time and place of hearing thereon by posting a copy of this order in a conspicuous place where bills for gas

service are paid for a period of at least seven (7) days prior to October 24, 1983, and by publishing a copy of this order in a newspaper, duly qualified by the Secretary of State, once between the date hereof and October 24, 1983, and a second time between October 24, 1983 and January 9, 1984, in newspapers published and of general circulation in the Counties of Barbour, Braxton, Brooke, Doddridge, Grant, Hancock, Harrison, Lewis, Marion, Marshall, Mineral, Monongalia, Ohio, Preston, Randolph, Ritchie, Tucker, Upshur, Wetzel, Boone, Cabell, Calhoun, Clay, Gilmer, Greenbrier, Jackson, Kanawha, Lincoln, Logan, Mason, Mercer, Mingo, Monroe, Putnam, Raleigh, Roane, Summers, Wayne, Wood and Wyoming, making due return to the Commission on or before October 24, 1983 and January 9, 1984, respectively. Written objection or protest may be filed with the Public Service Commission at its offices located in the State Capitol Building, Charleston, West Virginia, within ten (10) days of the date of publication.

The Executive Secretary of the Commission is hereby directed to serve a copy of this order upon all persons who noted their appearance at the prehearing conference: Columbia Gas of West Virginia, Inc., Commission Staff, Consumer Advocate Division, Weirton Steel Division and Westvaco by United States First Class Mail.

A TRUE COPY
TESTE:

HOWARD M. CUNNINGHAM,
Executive Secretary

MB: 1c

(3)

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1395

IN THE

Supreme Court of the United States

October Term, 1985

NATIONAL STEEL CORPORATION,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of West Virginia

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IN OPPOSITION

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March 22, 1986

22pp

QUESTION PRESENTED FOR REVIEW

Whether the Public Service Commission of West Virginia, in establishing a methodology for cost recovery by a state regulated public utility, failed to provide sufficient notice of such methodology in violation of the Fourteenth Amendment of the United States Constitution.

MISCELLANEOUS

Re: Columbia Gas of West Virginia, Inc., Case Nos. 80-336-G-30C and 81-366-G-30C, 47 PUR 4th 392, (1982), 69 ARPSCWV 633 (1982) 9

Re: Columbia Gas of West Virginia, Inc., Case No. 82-739-G-30, _____ARPSCWV_____, (1983) 9

Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle.....3

NO. 85-1395

IN THE

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October Term, 1985

NATIONAL STEEL CORPORATION,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of West Virginia

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IN OPPOSITION

The respondent, the Public Service Commission of West Virginia, herewith opposes the petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia filed by the petitioner, National Steel Corporation.[1]

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[1]Pursuant to Rules 22 and 34.2, respondent adopts the portions of the petition filed in response to Rule 21.1(b), (d), (e), and (f).

ADDITIONAL STATUTORY PROVISIONS

West Virginia Code §24-1-1 provides in pertinent part:

> (a) It is the purpose and policy of the legislature in enacting this chapter to confer upon the public service commission of this State the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:
>
> ***
>
> (4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference and based primarily on the costs of providing these services; . . .
>
> ***
>
> (b) The legislature creates the public service commission to exercise the legislative powers delegated to it. The public service commission is charged with the responsibility for appraising and balancing the interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.
>
> (c) The legislature directs the public service commission to identify, explore and consider the potential benefits or risks associated with emerging and state-of-the-art concepts in utility management, rate design and conservation.

STATEMENT OF THE CASE

The petition filed in this case arises out of a proceeding before the Public Service Commission of West Virginia (Commission), Case No. 83-348-G-30C. This case was

filed by Columbia Gas of West Virginia (Columbia)[2] to pass through to its customers purchased gas costs pursuant to the Commission's purchased gas adjustment (PGA) procedure, commonly known as Rule 30-C.[3] In order to understand the factual situation which gave rise to the subject case, it is helpful to review the history and the purpose of Rule 30-C.

BACKGROUND

Natural gas utilities in West Virginia charge rates for gas service that are composed of two parts. Approximately 20% of the rate relates to costs incidental to the ability to maintain and operate the gas utility. The remaining 80% of the rate is the direct result of costs involved in procuring the gas commodity from a wholesale or other supplier, and may include a combination of demand costs (fixed costs) and commodity costs (variable costs) depending on the size of the natural gas utility.

By General Order No. 183.4, entered on June 26, 1979,

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[2]At the time of the filing, Columbia sold natural gas at retail in the State of West Virginia. Columbia purchased its gas supplies almost exclusively from Columbia Gas Transmission Corporation, an entity whose rates and charges are regulated by the Federal Energy Regulatory Commission.

[3]Rule 30-C of the Commission's *Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle* is a voluntary accelerated rate procedure available to natural gas utilities subject to the jurisdiction of the Commission. Rule 30-C provides a mechanism whereby gas utilities may recover increases in the cost of gas purchased from their suppliers in a more timely fashion than would be possible in a general rate proceeding. The complete text of Rule 30-C, as amended in 1979, can be found in Appendix E, page 65a, of the Petition for Writ of Certiorari filed by National.

the Commission adopted several changes in the then existing Rule 30-C mechanism. One of these changes involved the cessation of the use of monthly purchased gas adjustments and the adoption of a levelized annual adjustment. This change was initiated due to concerns over monthly fluctuations in gas rates that proved confusing to customers. The effect of this change was to allow gas utilities to file in August of each year an estimate of purchased gas costs for the annual period beginning November 1. Included with the application is a statement of actual purchased gas costs, including any over or underrecovery, and refund information for the previous twelve months ending June 30. After review of this data and a hearing, if necessary, the Commission issues an order which allows the utility to recover prospectively a purchased gas cost composed of three elements: *estimated* gas costs for the ensuing twelve months; an *actual* cost adjustment (ACA) for over or underrecoveries of purchased gas costs for previous periods; and applicable adjustments for taxes and unaccounted for gas. It is the method of recovering the actual cost adjustment amount that is at issue in this proceeding.

THE CASE BELOW

The instant case arises out of the aforesaid Rule 30-C proceeding before the Public Service Commission. On August 10, 1983, Columbia filed an application with the Commission to change rates for natural gas service in compliance with Rule 30-C. The application was designated as Case No. 83-348-G-30C, and by order entered on September 21, 1983, a prehearing conference was scheduled to establish the identities of the parties, the issues to be addressed, and the procedural schedule to be followed.

As a result of the prehearing conference, an order was

issued on October 13, 1983, setting an interim hearing for October 24, 1983, for the purpose of establishing interim rates, with the final substantive hearings to begin on January 9, 1984.

On October 24 and 25, 1983, the interim hearings were conducted and on November 14, 1983, an interim purchased gas cost was established. After the advance filing of direct and rebuttal testimony by all parties, hearings were held on January 9 and 11, 1984, on the case in chief. At the conclusion of these hearings, parties submitted simultaneous initial and reply briefs on all relevant issues.

On October 31, 1984, the Commission entered an order approving the interim rates and adopting a modified method of recapturing prior period underrecoveries by ordering Columbia to directly bill each customer in the LV-1, LV-2, IUS-1 and IUS-2 rate schedules for any underrecovery balances, or to refund to such customer any overrecovery balance.

After reviewing petitions for reconsideration filed by several parties, the Commission issued its December 28, 1984 Order on Petition for Reconsideration, which modified the October 31, 1984 Order by changing the beginning date for calculating the comprehensive balance to July 1, 1980 and providing for payments or refunds to be made on a prospective basis in twelve equal monthly installments, without interest, after receiving notification of the account balance.

On January 28, 1985, National appealed the Commission decision to the Supreme Court of Appeals of West Virginia. A similar petition was filed by Westvaco Corporation, another party to the proceeding. After briefing and oral argument thereon, the Supreme Court of Appeals of West Virginia, by majority vote, denied the appeals without opinion on April 23, 1985.

While the appeals were pending in the Supreme Court of

Appeals of West Virginia, and subsequent to that Court's refusal to grant an appeal, the Commission issued several further orders in the case which were designed to clarify the effect of the October 31, 1984, and December 28, 1984, Orders. The first such Order, entered on February 28, 1985, rejected the calculations filed by Columbia's successor, Mountaineer Gas Company,[4] and ordered the Commission's Staff to calculate the appropriate balances by March 20, 1985. The Order provided all interested parties an opportunity to file comments by April 4, 1985, which period was subsequently extended to April 12, 1985.

By Order entered April 24, 1985, the Commission approved the Staff calculations and reinstated the payment obligations. On May 3, 1985, Mountaineer Gas Company requested that it be authorized to collect business and occupation taxes on outstanding balances. On May 17, 1985, National filed a motion for a reopening of the comment period on the Staff's calculations of over or underrecovery balances.

On June 13, 1985, the Commission reopened the comment period through June 24, 1985, and authorized the collection of applicable taxes on outstanding account balances. The comment period was subsequently extended through July 1, 1985.

Comments on the matter were submitted by Westvaco Corporation and National on June 24, 1985 and July 1, 1985, respectively. National also filed a petition for reopening and reconsideration.

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[4]On May 25, 1984, the Commission entered an Order approving the acquisition of all the common stock of Columbia Gas of West Virginia by Allegheny and Western Energy Corporation, which resulted in Columbia being renamed Mountaineer Gas Company. It is Mountaineer Gas Company that will be sending the direct bills to the Petitioner.

On July 10, 1985, the Commission issued a Final Order in the proceeding denying National's petition for reopening and reaffirming in all substantive parts the Commission's position as enunciated in the October 31, 1984, and December 28, 1984, Orders.

On August 9, 1985, National again appealed the Commission's Orders to the Supreme Court of Appeals of West Virginia. A similar petition was filed by Westvaco Corporation and by a group of industrial customers of Columbia. After briefing and oral argument, the Supreme Court of Appeals of West Virginia unanimously rejected the appeals without opinion on November 6, 1985.

REASONS FOR DENYING THE WRIT

The Petitioner in this case contends that the Commission has committed two acts repugnant to the due process requirement of the Fourteenth Amendment to the United States Constitution. First, it is contended that the Commission failed to follow its administrative rules; second, the Petitioner asserts that the Commission's decision results in retroactive ratemaking. Each contention is without merit.

The Petitioner has failed to demonstrate a justification for further review of the Commission's decision by this Court. As will be demonstrated below, the actions of the Commission are consistent with its statutory responsibilities and do not conflict with relevant decisions of this Court or other courts and administrative agencies.

I. The Commission's Actions Were Consistent With The Intent And Prior Application Of Rule 30-C

The Petitioner has alleged that this proceeding was tainted by the failure of the Commission to follow its ad-

ministrative rules. The Commission believes that its decision in this proceeding conforms to both the intent and prior application of Rule 30-C.

As has been previously mentioned, Rule 30-C is an optional, expedited method of rate recovery that is limited in its application to the recovery of purchased gas costs. By its very nature, and the fact that it contains no provision allowing for the recovery of any revenues associated with base rates,[5] Rule 30-C merely serves the purpose of truing up gas costs with revenues received. Under Rule 30-C a gas utility is allowed to recover its actual, prudently incurred purchased gas costs through a purchased gas adjustment rate. That rate contains an estimate of future purchased gas costs plus an actual cost adjustment for purchases made in previous periods. In some cases the ACA amount may be an overrecovery, which results in a reduction in the purchased gas adjustment. During periods in which the utility does not collect its actual purchased gas costs, an underrecovery results, and that amount is added to the purchased gas adjustment calculation. Despite what the Petitioner's have alleged, Rule 30-C has worked in that fashion since its amendment in 1979. At the end of every period there is invariably a net overrecovery or underrecovery that is carried forward to the next period.

Therefore, Rule 30-C serves both as a guide to predicting the future cost of gas purchased by a public utility from its suppliers and as a mechanism for truing up revenues with actual gas costs. One of the underlying premises is that the estimated rates approved in November of each year may be more or less than the actual future cost of gas; consequently, the rate is later adjusted

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[5]The Commission uses the terminology "base rate" to describe the approximately 20% of the total gas rate that is related to the non-commodity costs.

through the use of the ACA mechanism to ensure that the utility is receiving its actual, prudently incurred gas costs. This adjustment is necessary because Columbia's principal wholesale gas supplier routinely changes its purchased gas cost rate every six months, while Columbia is allowed under Rule 30-C to make only one such change per year. During periods of rapidly escalating gas prices and diminishing retail customer usage, as was experienced during the period covered by the instant proceeding, under-recovery of gas costs is almost a certainty. For that reason, the ACA plays an important role by ensuring that the utility is made whole for costs it has incurred by truing up the balances between costs and revenue recovery.

In promulgating Rule 30-C, the Commission realized that it could not be routinely applied to every gas utility in West Virginia, due to the varying sizes and purchasing practices of the more than forty-one gas utility companies operating in the State. Therefore, the Commission has treated Rule 30-C as a vehicle for establishing the minimum filing requirements necessary for the accelerated recovery of purchased gas costs, while reserving for itself, in the preamble of the Rule, sufficient discretionary powers to allow the Commission to tailor the application of the Rule to the exigencies of the particular utility under review:

> The Public Service Commission of West Virginia may interpret this rule if necessary and may require appropriate action based upon any such interpretation. The Commission reserves the authority under its general power to review any information filed under this rule and to order appropriate changes based on applications before the Commission. If any provision of this rule would result in undue hardship for a utility or its customers, the Commission may modify the ap-

plication of this rule appropriately. (Rule 30-C, Petitioner's appendix, page 71a)

The Petitioner claims that the instant Rule 30-C proceeding was not "normal" in that the Commission did not strictly adhere to the literal language of Rule 30-C. The Petitioner is aware, however, that no Columbia Rule 30-C case since the amendment of the Rule in 1979 has strictly followed the literal language of the Rule. Instead, the Commission has exercised the power it reserved to modify the application of the Rule on a case-specific method to prevent undue hardship. For example, in Columbia Case Nos. 80-336-G-30C and 81-366-G-30C, 47 PUR 4th 392, (1982), the Commission modifed the application of the Rule to allow a calculation of over or underrecoveries by customer class based on monthly sales. In Columbia's next filing, Case No. 82-378-G-30C, _____ ARPSCWV _____, (1983), the Commission adopted a further modification of the application of the Rule to allow demand costs to be tracked according to customer classes. The instant filing simply went the next logical step in cost recovery by requiring that gas costs be directly recovered from the customer causing the utility to incur the cost. In each of the cases in which the application of the Rule was modified the Petitioner was granted intervenor status and actively participated in the proceeding. Therefore, the Petitioner knew that it was common practice for the Commission to modify its Rule from case to case.

In all other respects the instant proceedings was unexceptionable. Pursuant to Commission Order and *West Virginia Code* §24-2-4a, notice of the proposed purchased gas increase was published as a Class II legal advertisement in every county in which Columbia did business. This notice afforded customers an opportunity to file their protests with the Commission or to seek status as in-

tervenors in the proceeding. The Petitioner in this case belonged to the clearly identifiable large volume industrial usage class. Although Petitioner's individual gas purchases from Columbia were purportionately higher than those for other customers, there is no statutory requirement that individual or actual notice be given to each customer of a proposed rate increase. Indeed, it is because of the Petitioner's large usage of gas that such notice is unnecessary. This Court should recognize that the Petitioner is not an unsophisticated customer victimized by inadequate notice, but a customer that knows not only what a Rule 30-C proceeding entails, but also that every gas utility company in West Virginia makes such a filing annually. Many large volume customers have entire departments that do nothing more than track the usage and cost of energy, and are exceedingly knowledgeable in the way the Commission handles gas cost proceedings.

Due process imposes constraints on governmental decisions which deprive individuals of certain "liberty" or "property" rights by requiring that some form of hearing be held before an individual is finally deprived of a property interest. *Wolfe v. McDonnell,* 418 U.S. 539, (1974). In *Memphis Light, Gas and Water Division v. Willie S. Craft,* 436 U.S. 1, (1978), this Court did not require a full evidentiary proceeding to satisfy due process standards as long as some informal administrative proceeding was available. Certainly, in this proceeding the opportunity afforded the Petitioner to present its arguments far exceeded the requirements of *Craft, supra.* For example, on October 5, 1983, the Commission held a prehearing conference to identify the parties and the issues to be addressed, at which time the Petitioner appeared by counsel. The Petitioner also participated in the interim hearings on October 24 and 25, 1983, and the final, substantive hearing on January 9 and 11, 1984, by presenting testimony,

cross-examining witnesses and filing a brief in opposition to the direct billing mechanism.

The Petitioner in this proceeding may not have liked the direct billing concept, but it can not truthfully claim that it was "surprised" by it or afforded an inadequate opportunity to challenge the decision. (Petition, p. 18) First, the issue of the substantial underrecovery in the large volume customer classes was a recurring area of concern. The amount of the underrecovery was clearly discernible by a review of Columbia's Rule 30-C application.[6] Similar information had been available to the Petitioner in each of Columbia's prior Rule 30-C filings. The Staff's direct testimony, filed on October 14, 1983 in the interim phase of the proceeding, specifically noted that the Commission might want to modify the application of the actual cost adjustment, but should defer that decision to the January case in chief proceedings. At that time, more than a year before the Commission's October 31, 1984 Final Order, the Petitioner should have been on notice of the possibility of modified application of the Rule. Indeed, on December 29, 1983, the staff filed its direct testimony in which the concept of direct billing of prior period underrecoveries was clearly presented. The Petitioner's claim that direct billing ". . . was not mentioned until near the end of the proceedings when it was injected into the case in the rebuttal testimony of a member of Resondent's Staff . . ." is simply untrue. (Petition, pp. 17, 18) The Petitioner was aware of the Staff's testimony two weeks prior to the final hearings and had ample opportunity to file testimony in

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[6]Columbia's Rule 30-C filing on Schedule No. 3, Sheet 2 of 7 showed a cumulative underrecovery balance for the twenty-four month period ended June 30, 1982 of over $5,000,000, which was directly attributable to underrecoveries in the large volume industrial customer classes.

opposition, cross-examine the Staff's witness or request futher hearings on the issue.

This "surprise" testimony did not create a "sudden" conflict for Petitioner's legal counsel, as has been claimed. (Petition, p. 18) The record will reflect that counsel for Petitioner vehemently opposed the direct billing concept, believing that it would be detrimental to his client's interests. In any event, although the closing date of the sale of the Weirton Steel Division of National Steel Corporation was officially on January 11, 1984, Weirton had been operated for the account of the prospective purchaser, Weirton Steel Corporation, as of May 1, 1983. Obviously, the Petitioner had adequate time to have obtained necessary counsel had it so desired.

II. The Commission's Decision Requiring The Petitioner To Pay Nothing More Than The Actual Cost For Services Rendered Does Not Constitute Retroactive Ratemaking.

It should be noted at the outset that although the petition for a writ of certiorari is based on an alleged denial of due process, the Petitioner did not strongly assert that issue before the Supreme Court of Appeals of West Virginia. Indeed, the petition for appeal filed by the Petitioner in that Court contained only slightly more than one full page of argument on that issue. Instead, the Petitioner focused on a claim under West Virginia law that the Commission's action in authorizing direct billing of prior period underrecoveries constitutes an impermissible attempt to recover "past losses" retroactively.[7] The West

[7]The Commission believes that the issue of retroactivity is a state issue involving the application of state statutory law and the regulations of a state agency which were reviewed by the state supreme court, and, therefore, does not present a federal question. In any event, the Commission did not engage in retroactive ratemaking.

Virginia Supreme Court of Appeals has addressed the area of retroactive ratemaking on several occasions. In *Chesapeake & Potomac Telephone Company of West Virginia v. Public Service Commission,* _____ W.Va. _____, 300 S.E.2d 607, 619, (1982) (rehearing denied, 1982), the Court expounded upon the Commission's statutory ratemaking authority:

> This concept (of acting prospectively) is inherent in the statute establishing the general power of the Commission to ". . . affix reasonable rates . . . to be followed in the future." *West Virginia Code* §24-2-3 (1980 replacement volume). Generally, retroactive ratemaking occurs when a utility is permitted to recover an additional charge for past losses, or when a utility is required to refund revenues collected, pursuant to then lawful rates.

The Commission in its Statement of Reasons for the Entry of Order, filed in accordance with Section 24-5-1 of the Public Service Commission Law, *West Virginia Code* §24-5-1, stated to the Supreme Court of Appeals of West Virginia that direct billing of underrecoveries did not result in the recovery of any "past losses." Indeed, allowing direct billing would have no effect on the utility's net revenues, nor would it allow the utility to increase its rate of return or profit levels. The Commission explained to the Court the source of the underrecoveries, and showed the Court that the underrecoveries were nothing more than costs Columbia had incurred directly for the benefit of the Petitioner and other large volume users. These costs related to actual gas consumption and represented nothing more than a truing up of actual purchased gas costs with the amount recovered through the PGA rate. As such, it is not covered by the prohibition on retroactive ratemaking,

recover traceable prior period costs has also been adopted by the Federal Energy Regulatory Commission in *Transcontinental Gas Pipe Line Corporation,* 32 FERC §61,230 (1985). In that case, nearly $127,000,000 in prior period production related costs, dating back to 1980, were directly billed to customers under a method similar to that employed by the Commission.

The Petitioner has not been deprived of its property without due process of law. The Petitioner knew that it was paying estimated rates subject to an annual matching of costs and revenues, and should be required to pay the actual cost for gas services rendered.

CONCLUSION

The petition raises no question warranting plenary review by this Court of the Supreme Court of Appeals' orders denying review of the Commission's action requiring direct billing of underrecoveries based on actual costs for purchased gas. The petition should be denied.

Respectfully submitted,

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March 22, 1986

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL STEEL CORPORATION,

Petitioner,

v

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia

REPLY BRIEF OF PETITIONER NATIONAL STEEL CORPORATION

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REPLY BRIEF OF PETITIONER NATIONAL STEEL CORPORATION

Reply to Brief in Opposition

Respondent Public Service Commission of West Virginia provides this Court with two reasons for denying the writ of certiorari. Petitioner National Steel Corporation wishes to briefly respond to both of these reasons.

Respondent contends that its actions in the case below were consistent with the intent and prior application of

Rule 30-C. Respondent's omissions in this argument speak most loudly to its weakness. Respondent, while discussing the Rule 30-C and its purpose, cites only one portion of the Rule, the preamble, to justify the direct billing in the case below. The preamble provides that the Public Service Commission may "interpret" the Rule to prevent "undue hardship for a utility or its customers." Respondent fails to cite that portion of Rule 30-C which can be "interpreted" so as to support the direct billing of Petitioner National Steel Corporation. This omission is due to the fact that the Rule clearly provides for past underrecoveries of gas costs to be rolled into future gas rates. Respondent can find no section of Rule 30-C which would even remotely support its present position, clearly demonstrating that, in the case below, Rule 30-C was abandoned.

Respondent cites two cases in which minor unrelated calculation adjustments were made in prior Rule 30-C proceedings, claiming its position in the case below was the next logical step. Respondent does not explain how these minor calculation adjustments led to direct billing or how these calculations caused any conflict with the language of Rule 30-C, requiring interpretation. Petitioner submits that they did not. The clearest point to be raised by this portion of Respondent's brief is that Respondent cannot cite one case in which it has interpreted Rule 30-C to permit the direct billing of customers for prior underrecoveries of gas costs. This omission is a result of Respondent's unprecedented action in the case below

Another omission which demonstrates the fallacies in Respondent's argument is Respondent's inability to cite the language in its Orders which justify its new "inter-

pretation" of Rule 30-C. A finding that the utility or its customers were about to suffer "undue hardship" is required by Rule 30-C's preamble. No such finding was made. Respondent, until judicial review began, was not attempting to "interpret" Rule 30-C; rather, Respondent abandoned the Rule completely and ordered direct billing. Respondent admitted as much by calling its action a "case-specific modification" of Rule 30-C.

Respondent states that Petitioner was a "customer that knows not only what a Rule 30-C proceeding entails, but also that every gas utility company in West Virginia makes such a filing annually." (p. 11) Yet given the frequency of these filings, and the numerous gas utilities in West Virginia, Respondent is unable to provide this Court with one example of Rule 30-C being "interpreted" in a manner similar to the case below. Respondent is correct that Petitioner was a customer that knows what a Rule 30-C proceeding entails. That is the very reason for the petition for a writ of certiorari.

Respondent claims that Petitioner was not denied due process because hearings were held. Respondent does not address the central question raised by Petitioner. Respondent fails to explain how due process could have been provided when administrative rules were ignored, unprecedented direct billing was authorized, and no prior notice of the possibility of such action was given. Respondent fails to explain how due process was provided when it acted far beyond the scope of the public notice provided and its own Rule 30-C.

Respondent states that Petitioner "cannot truthfully claim that it was 'surprised'." (p.12) Petitioner resents the implications of the statement and would assert that

it is always surprised when an administraitve body flagrantly ignores its own administrative rules, when it ignores all legal precedent against retroactive ratemaking, and when it acts far beyond the scope of the notice which it provided to the public. More to the point, Respondent attempts to demonstrate the advance warning that Petitioner had, but can point to only vague hints and general concerns for past underrecoveries. Respondent provides no citation or attachment which "clearly presented" the direct billing concept. Interestingly, Respondent attempts to stretch the time in which it feels that Petitioner had notice by dating the time of notice from Respondent's Final Order. This was entered more than nine months after the final hearing.

Respondent also disputes that a conflict for counsel for Petitioner resulted from this retroactive ratemaking. Respondent does not explain how conflict on this issue could not have arisen between a present customer who would not obtain great advantage from direct billing and a past customer who would obtain great disadvantage. Respondent's curious injection of the May 11, 1983 date (p.13) has Petitioner stumped as to how this date has any bearing in the present case.

Respondent's second reason for denial is that it was not engaged in retroactive ratemaking. Petitioner, in its petition, demonstrated that retroactive ratemaking had occurred in order to show this Court how all legal precedent was abandoned, without notice, in the case below.

Respondent asserts, incredibly, that the direct billing is not recovery for past losses. Rather "the underrecoveries were nothing more than costs Columbia had incurred directly for the benefit of the Petitioner and other large

volume users." (p. 14) Petitioner is at a loss to understand the difference. Respondent admits that the costs used to calculate underrecoveries and set the direct billing are "related to actual gas consumption." (p. 14) Cost incurred in the past, related to actual gas consumption and then billed cannot be anything but retroactive ratemaking.

Respondent's attempt to call the PGA an estimated rate ignores the clear language of Rule 30-C which rolls all underrecoveries into future rates. Respondent then cites *Public Service Company of New Hampshire* v. *Federal Energy Regulatory Commission,* 600 F.2d 944 (D.C. Cir. 1978) to support its position that it is not engaged in retroactive ratemaking. A reading of that case, however, supports the exact opposite. In the above cited case, the Court stated that the use of cost-of-service tariffs with deferred billings was not retroactive ratemaking. Respondent, in its orders, administrative rules, or even in its brief in opposition, has never contended that Mountaineer Gas Company's tariff is a cost-of-service tariff with deferred billings. Mountaineer's tariff, like the tariff for every other utility in West Virginia, is a fixed tariff, where past costs are used to approximate actual current costs. The Court in *Public Service Company of New Hampshire, supra,* found that a proposed surcharge with this kind of tariff was retroactive ratemaking.

Respondent also cites *State of North Carolina ex rel. Utilities Commission* v. *CF Industries, Inc.,* 263 S.E.2d 559 (1980) for support. This case merely states that past underrecoveries can be rolled into past overrecoveries to calculate refunds. The Court never states that direct billing for past underrecoveries is proper and is not retro-

active ratemaking. It speaks to the calculation of refunds and not the billing of past customers.

Respondent clouds the issues presented by discussing prior overrecoveries without fully explaining the nature of a Rule 30-C proceeding. A utility engages in Rule 30-C proceedings on a voluntary basis. Instead of waiting for a full rate case to recover purchased gas costs, Respondent agrees to let a utility determine those particular costs on a yearly basis and adjust future rates accordingly. In return for this administrative proceeding which results in faster and easier cost recovery, the utility agrees to refund any past overrecoveries to its customers. This agreement prevents the utility from complaining about retroactive ratemaking and is the price of receiving the benefit of Rule 30-C. Petitioner, and other utility customers, receive no such benefit and have made no such agreement and, therefore, can justly object to retroactive ratemaking.

Respondent states that *W.Va. Code* §24-1-1(a)(4) requires its action in the case below. Respondent does not explain why Respondent has not modified Rule 30-C in a formal proceeding to meet this longstanding statutory language or why Respondent has not interpreted Rule 30-C in subsequent Rule 30-C proceedings as it did below. Respondent has felt this statutory constraint only once, in the case below. In actuality, no such statutory requirement exists, and Respondent is fully aware of it.

Petitioner wishes to directly address the footnote on page 16, which contends that abandonment by Petitioner of the gas system would result in a large rate increase to existing large volume customers. This position is unsupported in the record and is absurd. Petitioner did not

abandon the gas system by shutting down a plant or taking a plant off the system. Petitioner sold its facilities and they continue to be operated by the Weirton Steel Corporation. There is no evidence that the gas usage pattern of the facilities was altered by Petitioner's sale. Respondent's claim that Petitioner abandoned the gas system and affected gas costs makes no sense.

It is ironic that Respondent should cite *Transcontinental Gas Pipe Line Corporation*, 32 FERC §61,230 (1985). Petitioner is not arguing that retroactive ratemaking was a denial of due process, but that the manner in which the retroactive ratemaking was implemented was improper and denied Petitioner due process. One of the clearest examples of this impropriety is Respondent's failure to provide public notice of its intention to engage in retroactive ratemaking. In *Transcontinental*, Respondent has provided this Court with a perfect example of how the public notice should have been issued in the case below. The FERC notice in FERC Docket No. RP85-148-000 (Federal Register, Vol. 50, No. 105, Friday, May 31, 1985, pp. 23183-23184) plainly states the nature of the proceeding and the possibility of direct bills to customers. The terms "retroactive" and "direct billing" are contained at five different points in the FERC notice. The notice required by Respondent in the case below, when compared to this FERC notice, is obviously inadequate to meet basic due process requirements.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia, for the

reasons cited herein and in the Petition for Writ of Certiorari.

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FILED
MAR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL STEEL CORPORATION,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Respondent.

On Petition For Writ Of Certiorari From The Supreme Court Of Appeals Of West Virginia

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Petitioner,

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THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari From The Supreme Court of Appeals of West Virginia

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BRIEF AMICI CURIAE

INTRODUCTION

Diamond Shamrock Corporation, E. I. duPont de Nemours & Company, Inc., The Fostoria Glass Company, Globe Refractories, The Goodyear Tire & Rubber Company, Keyser Glass Container Company, Inc., Koppers Company, Inc., The Homer Laughlin China Company, Monsanto Company, Quaker State Oil Refining Corporation, Signode Supply Corporation, and Wheeling-Pittsburgh Steel Corporation are a repre-

sentative group of present or former industrial customers of Columbia Gas of West Virginia, Inc., which subsequently became Mountaineer Gas Company ("Mountaineer Gas"), and are *amici curiae* pursuant to the written consent of the parties simultaneously filed with this Court.

The interests of *amici curiae* in this case arise from the fact that they are aggrieved, as is petitioner, by an order of the Supreme Court of Appeals of West Virginia, denying review of respondent's order of July 10, 1985. *Amici curiae* petitioned the Supreme Court of Appeals of West Virginia for review of respondent's July 10, 1985, "Commission Order Approving Repayment Obligations After Further Comment" (Pet. App. B, p. 45a); however, unlike the petitioner, *amici curiae* were not parties to the proceedings before the respondent at the regulatory level.

The perspective of *amici curiae* in this case highlights the due process infirmities of the actions of the respondent and should assist this Court in a more thorough inquiry of that constitutional issue.

STATEMENT OF THE CASE

Amici curiae adopt by reference the Statement of the Case set forth in the Petition. A brief review of the necessarily limited involvement of the customers of Mountaineer Gas may assist this Court in focusing on the constitutional principle at stake.

On October 13, 1983, Columbia Gas was ordered by respondent to publish respondent's "Commission Order Establishing a Procedural Schedule" as a public notice, pursuant to that Order's terms. Pet. App. E,

p. 78a. Although the petitioner had intervened as an industrial customer in the proceeding before respondent, the remaining industrial customers only became aware of the devastating impact of Case No. 83-348-G-30C after receipt of respondent's June 13, 1985, "Order On Further Reconsideration," nearly *two years* after the initiation of the proceeding. That June 13, 1985, Order is referred to in respondent's Order of July 10, 1985, (Pet. App. B, p. 45a), and provided *amici curiae* and similarly situated nonparticipants *less than two weeks* (i.e., until June 24, 1985) in which to review the entire record in Case No. 83-348-G-30C, obtain counsel, and file comments with respondent about the accuracy of Staff's "calculations and methodologies" in developing the over/under-recovery balances later set forth in the July 10, 1985, Order's two Appendices. Pet. App. B, pp. 53a and 54a. Those "calculations and methodologies" were not contained in the respondent's order, nor were customers told how those calculations and methodologies could be obtained. The overwhelming majority of the parties affected by the Order of the respondent had at best a limited opportunity to participate in Case No. 83-348-G-30C.

SUMMARY OF ARGUMENT

I. Corporate citizens of the United States are entitled to due process in state actions which imperil their property, including state action such as the regulatory proceedings of respondent in Case No. 83-348-G-30C. The requirements of Rule 30C *promulgated by the respondent* conflict directly with the actions of respondent in Case No. 83-348-G-30C in assessing rates for prior periods not covered by the

scope of Rule 30C. This substantial deviation by respondent from its rule, without meaningful notice to the affected parties, deprived the former and present customers of Mountaineer Gas of the due process of law guaranteed by the Fourteenth Amendment. As a result, those customers lacked the constitutionally mandated opportunity to confront and cross-examine witnesses who testified contrary to their interests. *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U.S. 292; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U.S. 88; *Goss* v. *Lopez*, 419 U.S. 565.

II. Respondent engaged in retroactive ratemaking contrary to applicable statutory law of West Virginia. The actions of respondent violated the due process clause of the Fourteenth Amendment. *Virginia Electric and Power Co.* v. *Public Service Commission of West Virginia*, 162 W.Va. 202, 248 S.E.2d 322 (1978); *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U.S. 23.

ARGUMENT

A. THE LACK OF MEANINGFUL NOTICE AND THE SCANT OPPORTUNITY TO "COMMENT" ON A CLOSED RECORD DEPRIVED THE AFFECTED CUSTOMERS OF THE DUE PROCESS OF LAW GUARANTEED THEM UNDER THE CONSTITUTION OF THE UNITED STATES.

The industrial customers of Mountaineer Gas are corporate citizens of the United States and are assured procedural due process in all state actions in which their property is at stake:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Const. amend. XIV, §1, cl. 2. *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510. The actions of the respondent are regulatory proceedings and constitute state action within the meaning of the Fourteenth Amendment. *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U.S. 292. The issue before this Court is therefore whether the actions of the respondent, in assessing retroactive rates contrary to the limited prescription of Rule 30C and the provisions of the West Virginia Code, deprived those industrial customers of Mountaineer Gas of due process of law.

Under the "Commission Order Establishing a Procedural Schedule" entered October 13, 1983 (Pet. App. E, p. 78a), which was printed as a legal advertisement in newspapers of general circulation in the service territory of Columbia Gas, the respondent scheduled a hearing to be conducted on Columbia's purchased gas costs as determined pursuant to the respondent's Rule 30C. The notice did not, in any way, indicate that the potential existed in Case No. 83-348-G-30C for *ex post facto*, "underrecovery" assessments dating back to 1980 and touching even former customers of Columbia Gas no longer served by Mountaineer Gas, Columbia's successor. No reasonable consumer reading the published notice would conceive of the potential impact of the proceeding before respondent:

> Application to change rates, effective November 1, 1983, according to Rule 30C, General Order No. 183.4, Purchased Gas Application.

Pet. App. E, p. 78a. This is the *only* portion of the notice which addresses the scope of Case No. 83-348-G-30C, and was arguably the only notice received by those customers who chose not to participate in the proceeding before respondent. Any customer who reviewed respondent's published version of its Rule 30C, the rule referenced in the legal notice, would not reasonably assume that the proceeding would lead to retroactive assessments. This Court need only compare the text of Rule 30C with the outcome of Case No. 83-348-G-30C reflected in the July 10, 1985, Order (Pet. App. B, p. 45a) to realize that respondent's order constitutes an obvious deprivation of due process. Rule 30C reads in pertinent part:

> This rule sets forth a procedure for changing the *rates* per Mcf charged to customers . . .
>
> * * *
>
> (A) APPLICATION
>
> Any change under this rule in the rates charged by a gas utility shall apply for a twelve-month period *from November 1 through October 31*. Each gas utility that requests an *adjustment in its rates* to reflect purchased gas costs shall submit an application on or before August 1. The application shall include *proposed rates* that reflect estimated purchased gas costs for the annual period *beginning on November 1*. The application shall also include a statement of actual purchased costs, cost over and under recovery and refund data *for the twelve months*

ending June 30, and such other supporting information as the Commission may require.

* * *

(3) NET OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

* * *

(e) Subtract the amount obtained in (d) from the gross over or under recovery for the period obtained in (D)(2)(a) to obtain the net amount of cost over or under recovery *in the preceding period to be recovered in the current period.*

* * *

(D) OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

The amount of allowable purchased gas costs determined in division (c) shall be increased or decreased by the amount of over and under recovery of purchased gas costs *in the preceding period.*

(E) PURCHASED GAS RATE

* * *

The product so obtained shall equal the rate per Mcf *to be rolled into the base rates of the utility for the current period.*

Pet. App. E, p. 65a (emphasis added). Despite the clear wording of Rule 30C, respondent's July 10, 1985, Order by its own terms (e.g., "payment" of "prior period purchased gas costs") imposed surcharges on prior gas purchases entirely unrelated to the "pro-

posed rates" referenced in Rul3 30C. Pet. App. B, p. 45a. Rule 30C and the single legal notice promulgated by respondent fail to give the slightest hint of the harsh treatment which the industrial customers of Columbia Gas eventually received as a consequence of the improper order in Case No. 83-348-G-30C. The text of Rule 30C and the solitary legal notice published by Columbia Gas are the most eloquent and persuasive arguments that the affected parties were deprived of due process in Case No. 83-348-G-30C.

The Fourteenth Amendment mandates that parties whose property rights are potentially affected by state action are entitled to a hearing. It is a necessary precedent to that mandate that parties be given meaningful notice of that hearing. This fundamental constitutional principle was enunciated more than a century ago in a decision by this Court:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall 223, 233, 17 L.Ed. 531 (1864).

Goss v. *Lopez*, 419 U.S. 565, 579. This Court has granted petitions for review in the past to preserve the principle that notice of state action must be *meaningful* notice. For example, in *Robinson* v. *Hanrahan*, 409 U.S. 38, the State of Illinois knowingly mailed an otherwise adequate notice to the former address of an incarcerated person. The state caprice at issue in *Robinson* pales when compared to the regulatory scheme at issue here. This case involves not the form or receipt of notice, but instead the content.

Most of the affected customers of Mountaineer Gas were in the same position as the petitioner in *Robinson*—unable to register opposition until well after Case No. 83-348-G-30C had been concluded to their detriment.

This Court established decades ago the fundamental right of administrative due process to confront and cross-examine those who present evidence against one's interests in regulatory proceedings.

> A finding without evidence is arbitrary and baseless. . . [I]t has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; . . .

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U.S. 88, 91. When viewed in the light of Rule 30C (Pet. App. E, p. 65a) and the sole notice of the proceeding (Pet. App. E, p. 78a), respondent's arbitrary deviation from the standards of its promulgated Rule 30C made the hearing in Case No. 83-348-G-30C a nullity.

The opportunity to confront and cross-examine members of respondent's staff and the other witnesses, as well as to submit their own evidence, was denied the vast majority of the affected industrial customers. Long before respondent informed the customers by actual notice of the true (if improper) nature of Case No. 83-348-G-30C, the exhibits were submitted, testimony taken, pleadings and briefs filed and a decision rendered. A specific group of customers of a public utility, each identified by name, were collectively handed a bill for approximately

$3,000,000 for prior gas service, subject only to an opportunity to "comment" within ten days. Any questions of witnesses went unasked and unanswered. No reply to the various pleadings could be filed. Instead, the permissible "comments" were limited to the "calculations and methodologies" of respondent's staff. Given respondent's improper deviation from Rule 30C, which was *not* subject to "comment," those "calculations and methodologies" amounted to no more than a financial body count. The affected persons were *never* provided with a meaningful notice of or opportunity to argue Case No. 83-348-G-30C on the merits.

B. THE ACTIONS OF RESPONDENT CONSTITUTE RETROACTIVE RATEMAKING AND ARE THEREFORE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The provisions of W. Va. Code § 24-2-3 (Pet. App. D) and Rule 30C permit only a prospective recovery of the "underrecovered" prior year's purchased gas costs through the *rates* charged on and after November 1, 1983. The Supreme Court of Appeals of West Virginia has clearly established that respondent is limited by state statute in its determination of utility rates to *prospective* adjustments only. *Virginia Electric and Power Co.* v. *Public Service Commission of West Virginia*, 162 W.Va. 202, 248 S.E.2d 322 (1978); *Chesapeake and Potomac Telephone Company of West Virginia* v. *Public Service Commission of West Virginia*, 300 S.E.2d 607 (W.Va. 1982). Yet, in Case No. 83-348-G-30C, the respondent authorized retroactive billing. The retroactive nature of the respondent's action is evidenced by the fact that *amici*

curiae were delivered statements requiring payment of fixed amounts, regardless of whether they continued to be customers of Mountaineer Gas. While the violation of W.Va. Code § 24-2-3 is a question of state law to be resolved by the Supreme Court of Appeals of West Virginia, this Court can and should review that statute and its construction by West Virginia's highest court as determinative of the deprivation of due process imposed by the respondent.

Rate making bodies which act in a legislative capacity may not act retroactively in fixing rates. *Arizona Grocery Company* v. *Atchison, Topeka, & Santa Fe Railway Company, et al.*, 284 U.S. 370. The legislative role of the respondent, and the limitations on that role, have been confirmed by the Supreme Court of Appeals of West Virginia. By permitting and calculating "repayment obligations," the respondent has undeniably engaged in retroactive rate making.

If the Petition is granted, it will certainly not be the first time that this Court has addressed the constitutional bar to retroactive ratemaking and taken the opportunity to reiterate that that bar exists for the protection of both utilities and their customers. *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U.S. 23. The contested actions of respondent clearly fall within the scope of this prohibition and for that reason alone should be reversed after a grant of the Petition.

The constitutional bar to retroactive ratemaking is supported by fairness and anchored in sound public policy. The property interests at stake go far beyond the dollar amounts reflected in respondent's July 10, 1985, "Commission Order Approving Repayment Obligations After Further Comment" (Pet. App. B, pp.

53a and 54a), which range from the $50,951 "rebate" awarded Kaiser Aluminum to the $815,627 surcharge imposed on Weirton Steel. These industrial customers have a compelling interest in conducting their operations in an efficient fashion and were deprived of that opportunity by respondent's unauthorized rewriting of Rule 30C. The viability of business depends in large part on its ability to monitor and control costs, including the cost of purchased natural gas, and to choose between that commodity and other alternative fuels in the operation of factories and plants. Those efforts since July 1, 1980, are now meaningless because the respondent has improperly recalculated earlier periods and permitted a public utility to assess a clearly supplemental, and retroactive, charge on the gas utilized in that prior period. The right of these industrial customers to remain cognizant of and, if appropriate, to participate in proceedings before the respondent is invaluable. That right was disregarded by the respondent in Case No. 83-348-G-30C.

For reasons not disclosed, the Supreme Court of Appeals of West Virginia declined to review this proceeding on either statutory or constitutional grounds. Pet. App. A. In fact, the only tribunal which has addressed any of these issues is respondent itself. In short, most of the persons vitally interested in, or directly impacted by, Case No. 83-348-G-30C have not had their day in court. The patently arbitrary result is a clear deprivation of due process which must be checked by this Court if fairness to those affected by state regulatory bodies is to be preserved.

CONCLUSION

WHEREFORE, *amici curiae* respectfully request that this Court grant petitioner's Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia for the reasons set forth.

Respectfully submitted,

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